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No. 94- OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

DORIS A. SCOTT, Individually and as Personal Representative For The Estate Of JOHN WILLIAM SCOTT, Deceased,

Petitioner,

-vs-

JAMES L. HENRICH, DAVID J. FLAMAND, BUTTE-SILVER BOW LAW ENFORCEMENT AGENCY, CITY OF BUTTE, and COUNTY OF SILVER BOW,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Circuit Court erred in ruling as a matter of law that law enforcement officers acted in an objectively reasonable manner, under Fourth Amendment standards, in effecting the seizure of John Scott, despite evidence that their conduct violated both the law enforcement agency's own written rules and policies as well as contemporary accepted police standards.

2. Whether the Circuit Court erred in ruling as a matter of law that law enforcement officers acted in an objectively reasonable manner in view of clearly established law, so as to provide them with qualified immunity, despite evidence that their conduct violated the law enforcement agency's own written rules and policies.

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OPINIONS BELOW

There were several opinions delivered by the lower courts in this case, all of which are reproduced in the Appendix:

1. *Scott v. Henrich, et al.*, Montana District Court memorandum and order of January 3, 1991 [District Court order granting summary judgment to Respondents], *App.* 1 - 10.

2. *Scott v. Henrich, et al.*, 978 F.2d 481 (9th Cir. 1992), *opinion withdrawn* 994 F.2d 1343 (9th Cir. 1993)[initial Circuit Court opinion affirming summary judgment to Respondents], *App.* 11 - 19.

3. *Scott v. Henrich, et al.*, Ninth Circuit opinion of May 21, 1993, *opinion withdrawn* 994 F.2d 1343 (9th Cir. 1993)[amended Circuit Court opinion affirming summary judgment to Respondents], *App.* 20 - 29.

4. *Scott v. Henrich, et al.*, Ninth Circuit opinion of September 9, 1994, *opinion withdrawn* 39 F.3d 912 (1994)[second amended Circuit Court opinion affirming summary judgment to Respondents], *App.* 30 - 45.

5. *Scott v. Henrich, et al.*, 39 F.3d 912 (9th Cir. 1994)[final Circuit Court opinion affirming summary judgment to Respondents], *App.* 46 - 57.

STATEMENT OF JURISDICTION

On January 3, 1991, the United States District Court for the District of Montana entered summary judgment in favor of Respondends on Scott's civil rights claims under 42 U.S.C. §1983 [*App.* 1 - 10]. Scott appealed to the Court of Appeals for the Ninth Circuit, which, after three prior opinions were issued and withdrawn [*App.* 11 - 45], entered final judgment affirming the District Court on November 2, 1994 [*App.* 46 - 57]. Scott petitioned for rehearing, but that petition was denied on January 24, 1995 [*App.* 58 - 59]. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the following constitutional, statutory and regulatory provisions, which are quoted in relevant part:

United States Constitution, Fourth Amendment

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ... .

42 U.S.C. §1983

> **§1983. Civil action for deprivation of rights.**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State .... subjects, or

causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. * * *

Butte - Silver Bow Law Enforcement Agency Manual of Policy and Procedure [multiple provisions]

Objectives and Policies - Suspects - Barricaded

Objective: A tactical plan is essential to apprehend a barricaded suspect.

Policy: A barricaded suspect poses an extreme danger to officers who try to arrest him, as well as, to other people. Officers should not immediately flush a barricaded suspect. Rather, they should develop and proceed with a tactical plan.

Officers should seal avenues of escape and call for assistance. When the suspect is isolated, time is normally on the side of the officers. The department will use all its resources to remove the suspect from his location.

It is important to minimize the possibility of injury to the public and to the officers. Special equipment, including tear gas and trained personnel, should be requested as needed. All efforts should be made to persuade the suspect to surrender before force is used.

Objectives and Policies - Force -Use Of

Objective: The use of force must be reasonable and necessary to effect arrests or to protect others or the officer himself from bodily harm.

Policy: Some type of control is often needed to make arrests. Control may be made by advice, persuasion, or warning. Sometimes reasonable force is needed. Physical force should always be reasonable and necessary. It should not be used unless other reasonable alternatives have been exhausted or would be ineffective.

Objectives and Policies - Chemical Agents - Use Of

Objective: The use of chemical agents may be needed when there is a serious danger to life and property.

Policy: The use of chemical agents, such as tear gas, may be needed to minimize injury to suspects, officers, and other people, or to avoid a serious danger to life and property, and when other methods of control would be more dangerous.

STATEMENT OF CASE

I. Federal Jurisdiction

This is a civil rights action brought pursuant to 42 U.S.C. §§1983 and 1985. Federal jurisdiction exists under 28 U.S.C. §1331, as a case arising under the Constitution and laws of the United States.

II. Procedural Background

This case arises from the fatal shooting of John Scott by officers of the Butte-Silver Bow Law Enforcement Agency ("BSLEA"), which took place at John Scott's home in Butte, Montana, on August 4, 1984. The present action was filed on January 13, 1987, in the United States District Court for the District of Montana. The Complaint [CR 2] and Amended Complaint [CR 100] alleged claims for violation of John Scott's civil rights under 42 U.S.C. §§1983 and 1985, and also alleged a wrongful death claim arising under Montana law. Although the case was pending in District Court for just under four years, discovery was stayed in the action, pursuant to defense motions, for three of those years by order of the District Court [CR 59, 96].

On January 3, 1991, the District Court entered summary judgment in favor of all Respondents on the Federal claims and dismissed the state law claims for lack of jurisdiction, without prejudice to the refiling of those claims in state court [*App.* 1 - 10].[1] The District Court reasoned that the officers may have acted negligently, but that Scott's Federal claims failed because he needed to prove, and was unable to prove, "gross negligence" to establish liability under 42 U.S.C. §1983 [*App.* 7 - 9]. The District Court also ruled that the officers were entitled to qualified immunity [*App.* 7].

Scott appealed the entry of summary judgment to the Ninth

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[1]On February 22, 1991, the state law claims were refiled in Montana state district court. Pursuant to defense motions, those claims have been stayed for the last four years pending resolution of the Federal appeals.

Circuit [CR 176]. On October 15, 1992, the Ninth Circuit entered an opinion [*App.* 11 - 19] affirming the entry of summary judgment, holding not that Scott had failed to prove "gross negligence", but rather that the officers had acted reasonably as a matter of law under Fourth Amendment standards [*App.* 15]. The opinion failed to address, or even mention, Scott's primary arguments on appeal, that the officers had violated their agency's own written rules governing the use of force, and that expert testimony supported Scott's position that the officers had acted unreasonably. Scott filed a petition for rehearing asking the Ninth Circuit to address these issues.

On May 21, 1993, in response to Scott's petition for rehearing, the Ninth Circuit issued an amended opinion [*App.* 20 - 29]. The amended opinion still did not discuss the testimony of Scott's expert that the officers had acted unreasonably. However, the amended opinion did address the agency's rules governing the use of force, holding (although the defendants had never argued the point) that those rules were not meant to protect suspects, and thus were of no assistance to Scott [*App.* 24 - 25].

Scott filed a second petition for rehearing following the entry of the Ninth Circuit's amended opinion, pointing out that the defendants had admitted in discovery that the agency's rules were indeed meant to protect suspects. In response to the second petition for rehearing, the Ninth Circuit withdrew both of its previous opinions on August 14, 1993. On September 9, 1994, the Ninth Circuit issued a new opinion [*App.* 30 - 45]. The majority opinion was essentially identical to the amended opinion withdrawn by the Order of August 14, 1993. However, whereas the previous decisions had been unanimous, the opinion issued September 9, 1994, was

accompanied by a vigorous and, Petitioner submits, well reasoned dissent [*App.* 40 - 45].

On November 2, 1994, without any prompting from the parties, the Ninth Circuit withdrew its September 9, 1994, opinion and issued a further amended opinion [*App.* 46 - 57]. The November 2, 1994, opinion again affirmed the entry of summary judgment by a 2 - 1 decision. Scott petitioned for a rehearing of the decision, and that petition was denied on January 24, 1995 [*App.* 58 - 59].

Scott now petitions for review of the Ninth Circuit's final opinion entered on November 2, 1994.

III. Underlying Facts

On August 4, 1984, John Scott allegedly committed a misdemeanor offense of discharging a weapon in a residential area. Minutes later, John Scott lay dead in his own doorway, shot in the back by police officers who, in violation of their own agency's rules as well as generally accepted police practices, chose to storm his residence with heavy weapons, rather than making the least effort to communicate with Mr. Scott or coax him into surrendering. The facts, viewed in the light most favorable to Scott, as required when reviewing the entry of summary judgment, are as follows:

A. Background - Sullivan And Maestas

On August 4, 1984, John Scott and his wife, Doris, lived at 701 West Park Street in Butte, Montana [CR 120, p.16]. The apartment building at that address was owned by John Scott [CR

120, p. 123]. John Scott had no criminal record and had never been suspected of criminal activity [CR 142, p 33].

One month earlier, one of the apartments in the building had been rented to Patrick Sullivan [CR 120, p. 18]. Sometime afterwards, Dean Maestas moved in with Sullivan [CR 120, p. 18]. Sullivan and Maestas were disruptive tenants [CR 120, pp. 19-20]. Both Sullivan and Maestas had histories of frequent run-ins with the BSLEA [CR 132, pp. 30-31; CR 133, p. 13; CR 130, pp. 11, 19, 20; CR 142, pp. 22-23].

Doris Scott had heard Sullivan and Maestas yelling at John Scott about a week before he was killed [CR 120, p. 20]. Sullivan and Maestas had threatened to harm John Scott or Doris Scott or their children [CR 120, pp. 19-20, 22]. To protect his family from Sullivan and Maestas, John Scott changed the locks on his front door, installing a double bolt lock, about two days before he was killed [CR 120, p. 22].

On or about July 29, 1984, John Scott noticed that the apartment of another tenant, Scott Pietrack, had been broken into and burglarized [CR 120, p. 24]. Entry was gained from a common hallway from inside the apartment building, not from the external door to the apartments [CR 120, p. 24]. The common hallway is generally accessible only to tenants [CR 120, p. 24]. John Scott reported the burglary to the BSLEA. The police report lists Dean Maestas as the only suspect in the crime [CR 66, Exh. 2].

Shortly before August 4, 1984, John Scott decided to evict Maestas and Sullivan and served them with an eviction notice [CR

120, pp. 19-20]. On August 4, 1984, John Scott used his truck to help move Sullivan and Maestas out of the apartment [CR 120, pp. 16-17]. John Scott was fearful that he might have problems with Sullivan and Maestas during the course of the move [CR 120, p. 26]. The precise events which transpired during the course of the move are not entirely known, but it is known that John Scott, as feared, did have problems with Sullivan and Maestas during the course of the day.

At 12:57 p.m. on August 4, 1984, John Scott called the BSLEA complaining of a disturbance caused by Maestas and Sullivan [CR 66, Exhs. 3, 4]. Two officers responded, Officers Hanninen and Miller [CR 130, p. 12; CR 133, pp. 12-18]. The officers confirmed the disturbance was being caused by Maestas and Sullivan, and they warned Maestas and Sullivan against causing further trouble [CR 66, Exh. 4].

Later that same day, at 3:25 p.m., John Scott again summoned the BSLEA because of a disturbance caused by Pat Sullivan [CR 66, Exhs. 5, 6]. Again, two officers were dispatched to 701 West Park, Officer Driscoll and Sergeant James L. Henrich [CR 129, p. 37]. Henrich arrived before Officer Driscoll and talked with John Scott [CR 66, Exh. 6]. According to Henrich's report, John Scott informed him that he had transported Sullivan away from the premises and that everything was all right [CR 139, Exh. 1].

B. The Prior Call

Later still that same day, at approximately 8:20 p.m., Henrich and Officer David Flamand were at the police station in

Butte, when they received a report that someone had fired a gun at 623 South Colorado Street [CR 139, p. 57]. Henrich and Flamand, and Officers Maylevac and Cassidy, reported separately to that address [CR 139, p. 62]. Henrich and Flamand arrived first and went to the porch of the residence at 623 Colorado, where they were met by Dean Maestas [CR 139, p. 66]. Maestas indicated that someone had shot at him, and the officers observed a bullet hole in the porch [CR 139, p. 69]. The shot had been fired downward into the corner of the porch, where in fact no one had been standing at the time [CR 42, Exh. A, pp. 19-21]. Henrich asked Maestas who had fired the shot, and Maestas could not come up with a name, but he did say he thought he had the name written down somewhere and went to look for it [CR 139, p. 69].

While at the 623 South Colorado address, the officers received a call that a man had fired a shot at the corner of Clark and Park Streets, several blocks away [CR 139, p. 71]. The incident at Clark and Park Streets was reported at approximately 8:25 p.m., on August 4, 1984 [CR 66, Exh. 7]. After receiving that call, and while Henrich was getting into his car to respond, Dean Maestas handed him a piece of paper - an eviction notice - which had the names of John Scott and Patrick Sullivan on it [CR 139, p. 70].

C. Henrich's Response

As noted above, Henrich had responded to a call earlier in the day at Clark and Park Streets, involving a disturbance by Pat Sullivan, and at that time had spoken with John Scott [CR 139, p. 45]. Enroute from 623 South Colorado to the corner of Clark and Park, Henrich received a radio transmission from Officer Driscoll,

attempting to remind him of the earlier call. Henrich responded, "I can't think of what you are talking about" [CR 139, p. 79]. Henrich made no attempt to follow up on the information Officer Driscoll was attempting to convey [CR 139, p. 79].

Upon arrival at the corner of Clark and Park, Henrich observed no immediate threat [CR 139, p. 42]. Henrich did speak very briefly to the manager of the City Center Motel (located on the same intersection) [CR 139, p. 86]. The motel manager pointed out the door at 701 West Park that the subject who had fired the gun had entered [CR 139, p. 86]. Henrich sought no other information from the motel manager [CR 139, p. 86]. None of the information he received indicated that the man had fired at anyone [Id.].

Henrich had numerous methods of determining the identity of the individual he was looking for [CR 139, pp. 38-39]. Nonetheless, Henrich made no attempt to make telephone contact with the suspect, and made no attempt to communicate with him using his vehicle's loud speaker before assaulting the door [CR 139, p. 42]. Henrich made no attempt to obtain any additional information from the dispatcher, including the identity of the complainant in the earlier call to which he had responded and of which Officer Driscoll attempted to remind him [CR 139, pp. 78-80].

After his brief conversation with the motel manager, Henrich went to the trunk of his car and retrieved an AR-15 assault rifle [CR 139, p. 88]. From there, he immediately moved to a van parked in front of the door at 701 West Park, and then to the door itself [CR 139, pp. 89-90]. Once he was at the door, still armed with assault rifle, Henrich propped the screen door of the door to John Scott's

apartment open with his foot and knocked on the door several times [CR 139, p. 100]. He then kicked the door and yelled, "Open up, police" [CR 139, p. 100]. He heard a fumbling of locks and saw the door start to open [CR 139, p. 100].

As the door opened, Henrich says he could see an unknown person (later identified as John Scott) inside the doorway holding a weapon, with the barrel pointed down [CR 139, p. 110]. Henrich claims he saw the barrel of the weapon come up; Henrich then jerked back from the doorway and fired a wild shot into the doorway [CR 139, pp. 110-111]. Henrich's shot did not strike John Scott [CR 139, pp. 110-111].

D. Flamand's Response

Flamand was also present at 623 South Colorado when the call pertaining to Clark and Park was received [CR 138, p. 39]. Enroute to Clark and Park Streets, responding to that call, Flamand heard the radio transmission between Henrich and Officer Driscoll [CR 138, p. 40]. Flamand also did not seek any additional information from the dispatcher [CR 138, p. 96]. However, Flamand felt there was confusion and uncertainty on the part of the officers when they arrived at Park and Clark [CR 138, p. 97]. Upon arrival, Flamand also met briefly with the motel manager [CR 138, p. 54]. The manager did not say anything to Flamand, but pointed towards the apartment building; Flamand did not ask the manager any questions [CR 138, pp. 54-55]. Flamand moved his vehicle across the street and spoke briefly with a young boy [CR 138, p. 61], who told Flamand that a man, "acting crazy", had fired a shot and staggered to the door of 701 West Park [CR 138, pp. 61-62]. No

indication was given that the shot had been fired at anyone [Id.]. In fact, the shot had been fired almost straight down into an empty storage cellar [CR 42, Exh. A, pp. 42-43].

By this time, Flamand had already armed himself with a shotgun [CR 138, p. 58]. Flamand ran from his car to Henrich's vehicle and then ran with Henrich to the van by the door at 701 West Park [CR 138, pp. 60, 64]. Flamand positioned himself behind a vehicle parked near the van while Henrich pounded on the door [CR 138, p. 77]. When the door started to open, Flamand moved, crossing in front of the doorway [CR 138, p. 46]. While doing this, Flamand claims he saw a man inside the doorway holding a long gun [CR 138, p. 46]. Flamand heard a shot and thought the person inside the doorway had fired [CR 138, p. 34]. "It definitely came from inside that hallway out - that's what I perceived - which reinforced my decision that he had fired and that I better stop him, if I'm able to, before he fires again" [CR 138, p. 88].

Flamand then fired four rounds through the screen door into the doorway [CR 138, p. 30]. The gunshot prompting Flamand to shoot had actually been the wild shot fired by Henrich; Scott himself fired no shots [CR 138, pp. 48-49]. One of Flamand's shots struck and mortally wounded John Scott [CR 138, pp. 30-31]. The fatal shot hit John Scott in the back [CR 173, p. 66] Apart from Henrich and Flamand, both of whom are parties, no other witness has claimed to have seen John Scott holding a gun at the door, or to have raised the gun as alleged by Henrich and Flamand.

The elapsed time for these events confirms the recklessness of the tactical response employed. Henrich, Flamand and Officer

Maylevac arrived at the corner of Park and Clark within seconds of one another [CR 132, p. 36]. The dispatcher's tape recording of the radio communications [CR 156], indicates that, when Henrich radioed to the dispatcher: "We'll be out over here" when he arrived [CR 139, p. 75; CR 156]. After the shooting, Officer Maylevac radioed the dispatcher to call the undersheriff and send an ambulance [CR 132, pp. 52-54; CR 156]. The total elapsed time between the arrival of the officers and the call for the undersheriff is approximately three minutes [CR 156]. According to Flamand and Officer Maylevac, approximately 30 to 45 seconds elapsed between the shooting of John Scott and the call for an ambulance [CR 138, p. 81; CR 132, p. 53]. Hence, the total interval from the time the squad cars first arrived on the scene and the time John Scott was killed was approximately two to two and one-half minutes [Id.].

The shotgun allegedly held by John Scott when he answered the door was examined by the Montana Crime Lab. John Scott's finger prints were not found on the gun [CR 66, Exh. 8]. After the shooting, it was determined that the shotgun allegedly held by John Scott was unloaded [CR 132, p. 46].

E. The Policies and Procedures Manual

The conduct of BSLEA's officers is governed by the Agency's Manual Of Policy And Procedure (the "Manual") [CR 66, Exh. 11]. The Manual prescribes rules and policies governing a variety of situations, including rules and policies applicable to the use of force and tactical responses to barricaded suspects. The Manual provides that officers "should not immediately flush a barricaded suspect", but rather "should develop and proceed with a

tactical plan" [CR 66, Exh. 11, "Objectives and Policies-Suspects-Barricaded"]. It further provides that force "should not be used unless other reasonable alternatives have been exhausted or would be ineffective" [CR 66, Exh. 11, "Objectives and Policies-Force-Use Of"]. The Manual provides that "chemical agents, such as tear gas, may be needed to minimize injury to suspects, officers, and other people" [CR 66, Exh. 11, Objectives and Policies - Chemical Agents - Use Of].

In the course of discovery in the District Court proceedings, Scott asked Respondents to designate a representative, pursuant to Rule 30(b)(6), F.R.Civ.P., for purposes of testifying as to "the formulation and administration of policies pertaining to tactical operations", such as those quoted above. Respondents designated Butte-Silver Bow Undersheriff Joseph Lee for this purpose [CR 144, pp. 59-60]. Undersheriff Lee admitted that the BSLEA tactical plan policies are designed to protect suspects, as well as others:

> Q. What is the purpose of formulating a tactical plan when responding to a call of "man with a gun?"
>
> A. The purpose of formulating any plan would be to minimize risk, injury, harm to the public, safety of the officer, *safety of the individual involved.*

[CR 137, p. 17 (emphasis added)][2]

F. Scott's Expert - Contemporary Police Practices

Scott also presented the opinions of an expert witness in law enforcement procedures, Dennis Payne, who submitted an Affidavit to the District Court 122; Excerpt E]. Mr. Payne's expert opinion, as set forth in his affidavit, was that Officers Henrich and Flamand acted unreasonably in view of the circumstances which confronted them, and violated the policies set forth in the BSLEA Manual. His testimony was that accepted police procedure, in responding to a report of an armed suspect entering a building, includes establishing perimeters to contain the suspect; gathering intelligence; and attempting to contact the suspect by telephone or by bullhorn [Id., pp. 11-12]. Once these preliminary actions are taken, accepted police procedures call for the officers to communicate with the suspect in an effort to talk him out or, where communication fails, to simply wait the suspect out or, where both communication and waiting fail, to use gas if necessary to force him out [Id., p. 12].

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[2]Virtually every other time Scott's attorneys attempted to question representatives of the Butte-Silver Bow Law Enforcement Agency regarding the meaning of their written policies on tactics and police procedures, the law enforcement witnesses refused to answer based on instructions from defense counsel [CR 136, pp. 4, 5, 6, 7, 8, 9, 10, 11, 19, 20, 21, 24, 25, 27, 28; CR 137, pp. 3, 7, 8, 9, 10, 11, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 32, 33; CR 138, pp. 3, 4, 5, 6, 7, 22, 23, 94, 95, 99; CR 139, pp. 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 23, 24, 25, 28, 29, 31, 32, 33, 37, 117, 122, 125; CR 140, pp. 2, 3, 5, 6, 31, 32, 33]. Scott moved to compel answers to the questions regarding the meaning of Defendants' written policies [CR 165], but the District Court granted summary judgment without ever having ruled on the motion.

According to Mr. Payne, except where hostages are known to be present and evidence exists that they are in danger of imminent injury or death, accepted police procedures recognize that an armed assault on the building should be avoided [Id., p. 12]. Such an assault is recognized to pose dangers to innocent bystanders or hostages, the police and the suspect himself, and may cause an otherwise controllable situation to escalate out of control [Id., pp. 12-13]. In Payne's opinion, Henrich and Flamand violated virtually every one of these recognized procedures - many of which are specifically incorporated in the BSLEA Manual - and resorted instead to an immediate and excessive use of force [Id., pp. 13-17].

ARGUMENT

I. In View Of The Manual And The Testimony Of Scott's Expert, The Circuit Court Erred In Ruling, As A Matter Of Law, That The Officers Acted In An Objectively Reasonable Manner Under Fourth Amendment Standards.

A. The Ninth Circuit Decision

The Ninth Circuit gave remarkably short shrift to Scott's arguments that the tactical response employed by Henrich and Flamand was unreasonable under Fourth Amendment standards. The appellate court's rationale for determining that the officers' conduct was reasonable as a matter of law, is set forth, in its entirety, as follows:

> Officers . . . need not avail themselves of the least

> intrusive means of responding to an exigent situation; they need only act within that range of conduct which we identify as reasonable. The officers here clearly did: It's hardly unreasonable for officers to take arms, knock on the door of an apartment and identify themselves as police when an armed man who, they are told, recently fired shots and is acting "crazy" lurks inside.

[*App.* 50]

This reasoning, unaccompanied by any citation of authority, amounts to a judicial determination of a disputed factual issue. Moreover, it frankly ignores two critical pieces of evidence which undeniably raised a jury issue on the question of whether it was reasonable for the officers to immediately storm John Scott's door with heavy weapons. First, and most importantly, there is the BSLEA Manual, whose rules and policies explicitly declare that officers "should not immediately flush a barricaded suspect", but "should develop and proceed with a tactical plan." Second, there is the detailed affidavit of Scott's expert in police procedures, Dennis Payne, which states that, under contemporary accepted police practices, officers should not attempt immediate entry into a building to subdue or arrest an armed suspect, unless they have concrete information that hostages have been taken and are being threatened with imminent harm [CR 122, p. 12].

B. Standards Of Review

Scott's claim in her civil rights action is that the BSLEA

officers violated the Fourth Amendment in effecting the fatal "seizure" of John Scott. As this Court has held, all claims that law enforcement officers have used excessive force, including deadly force, in effecting the arrest or other "seizure" of a free citizen must be analyzed under the Fourth Amendment and its standard of reasonableness. *Graham v. Conner*, 490 U.S. 386, 395 (1989). The standard applied to Fourth Amendment claims is whether the actions of the law enforcement officers were "objectively reasonable" in light of the facts and circumstances confronting them. *Id.* at 397.[3]

Of course, in reviewing an award of summary judgment, the facts of a case are to be viewed, and all inferences are to be drawn, in the manner most favorable to the non-moving party. *Adickes v. Kress & Co.*, 398 U.S. 144, 157 (1970); *United States v. Diebold Inc.*, 369 U.S. 654, 655 (1962). The courts are not to weigh the evidence and engage in resolving factual issues. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Questions of whether conduct is reasonable or not are almost always for the jury to decide, and are only rarely susceptible to summary judgment. *TSC*

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[3]In the initial decision granting summary judgment on Scott's civil rights claims, the District Court applied the wrong legal standard to Scott's claims under the Fourth Amendment. The District Court ruled that Scott had a burden of proving "gross negligence" to establish a claim for violation of constitutional rights, including rights established by the Fourth Amendment [*App.* 8 - 9] The District Court ruled that Scott had raised a jury issue as to whether the officers had acted negligently - i.e., unreasonably - but that she had failed to submit sufficient proof that they had acted with gross negligence [*App.* 8 - 9]. In fact, gross negligence is the standard which various circuit courts have applied to Fourteenth Amendment claims. *E.g., Bergquist v. County of Cochise*, 806 F.2d 1364, 1370 (9th Cir. 1986). It is not the proper standard for claims under the Fourth Amendment. *Graham v. Conner*, 490 U.S. 386, 397 (1989).

Industries, Inc. v. Northway, Inc., 426 U.S. 438, 450 (1976); *King v. Avtech Aviation, Inc.*, 655 F.2d 77, 78 (5th Cir. 1981).

C. Jury Issue Raised By BSLEA Manual

Courts, including this Court, have recognized that internal police rules and policies are relevant to the issue of whether officers have acted in conformance with constitutional standards. In *Tennessee v. Garner*, 471 U.S. 1 (1985), this Court considered police department policies in deciding the constitutionality of the use of deadly force against fleeing suspects. *Id.* at 18-19. In *Maddox v. Bunch*, 792 F.2d 1455 (9th Cir. 1984), the Ninth Circuit considered rules promulgated by the Los Angeles Police Commission, a civilian oversight body, in determining the constitutionality of choke-holds. *Id.* at 1456.

The Ninth Circuit majority opinion did not disagree that local police rules and policies are relevant to constitutional issues of excessive force. Nor did the Ninth Circuit majority base its decision upholding summary judgment on a conclusion that the officers had complied with the rules set forth in the Manual.[4] Rather, the

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[4]If anything, the record demonstrates conclusively that the officers violated many of the rules and policies set forth in the Manual. The rules on barricaded suspects [see p. 3, *supra*] provide that, "Officers should not immediately flush a barricaded suspect. Rather, they should develop and proceed with a tactical plan." The rules on use of force [pp. 3-4, *supra*] require officers to exhaust reasonable alternatives before resorting to force. The rules on chemical agents [p. 4, *supra*] provide that the use of chemicals such as tear gas may be necessary to prevent injury to suspects. Despite these rules, the officers here formulated no plan, employed no nonforceful alternatives, and did not even consider the use of chemical agents, but instead proceeded to immediately storm John Scott's residence and initiate an armed confrontation.

majority summarily dismissed the BSLEA rules as irrelevant, concluding they had been designed only for the protection of the police and public, not suspects [*App.* 50 - 51].

This conclusion was reached despite the fact that never, in the entire lengthy history of this case, had Respondents argued their internal rules and policies were not designed to protect suspects. [5] In fact, Undersheriff Joe Lee, Respondents' Rule 30(b)(6), F.R.Civ.P., representative for purposes of explaining the BSLEA policies [CR 144, pp. 59-60], admitted at his deposition that the BSLEA tactical plan policies *were* designed to protect suspects, as well as others [CR 137, p. 17]. Additionally, the BSLEA written policy on chemical agents, which applies directly to barricaded suspect situations, specifically states, "The use of chemical agents, such as tear gas, may be needed to minimize injury to *suspects*, officers, and other people ..." [CR 66, Exh. 11, Objectives and Policies - Chemical Agents - Use Of (emphasis added)].

As the Ninth Circuit dissenting opinion indicates [*App.* 55 - 56], these facts, in and of themselves, raise a jury issue on whether the BSLEA Manual was violated. This in turn raises a constitutional issue under *Tennessee v. Garner*, 471 U.S. 1 (1985), and other cases holding that local police rules and policies are relevant to the constitutional standards to be observed.

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[5] Indeed, even *after* the Ninth Circuit reached this conclusion, Respondents declined to endorse it. Although the issue has been a focus of two petitions for rehearing to which Respondents have filed written responses, they have never said they agree with the Ninth Circuit's conclusion that the BSLEA barricaded suspect procedures are not designed to protect suspects.

D. Jury Issue Raised By Expert Testimony

In addition, the Ninth Circuit majority's bald conclusion that rushing the door was"hardly unreasonable" [*App.* 50] is directly contradicted by the opinions of Dennis Payne, Scott's expert in police procedures.[6] In an 18-page affidavit submitted to the District Court [CR122], Mr. Payne set forth detailed opinions describing numerous deficiencies and errors in the tactics employed by the BSLEA officers which led directly to the death of John Scott. According to Mr. Payne, contemporary accepted police procedures call for officers, in responding to a report that a suspect with a gun has entered a building, to take steps such as the following:

> Cordon off the area and establish perimeters to contain the suspect and control civilian traffic;
>
> Gather intelligence as the the identity and background of the suspect, his mental state, his location in the building, the layout of the building, and other pertinent facts;
>
> Evacuate all civilians from the immediate area;

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[6]Mr. Payne holds a masters of science degree in criminology. He is also a 25-year veteran of the Michigan Department of State Police who, at the time of his retirement, held the rank of lieutenant colonel and Department deputy director. His duties with the Department included instructing state police officers in a broad range of police practices. He is also a member of the faculty and staff of the Michigan State University School of Criminal Justice, and is a graduate of the FBI National Police Academy in Quantico, Virginia. He has performed consulting work for police departments nationwide [CR 122, pp. 1-3]

> Communicate with the suspect, by telephone if possible or by bullhorn if necessary; and
>
> Recognize that time is on the side of the officers and that the best strategy, unless the suspect has taken hostages and is threatening to harm them, is to wait the suspect out [CR 122, pp. 11-12].

According to Mr. Payne, the tactical response employed by the BSLEA officers, of immediately storming the building with weapons drawn, was contrary to contemporary accepted police practices, and was unreasonable. As he testified:

> 12. Contemporary accepted police practices recognize that immediate entry into a dwelling or other building for an armed suspect should only be attempted if there are hostages and one has information that a hostage may die or be seriously injured if one does not act immediately. Short of this situation, and if there are no hostages, the appropriate response is to wait and attempt to resolve the situation by non-violent means. An assault on the building with an armed person is dangerous and will endanger innocent persons, the individual, and the officers. In addition, an immediate assault upon the building may cause a situation to escalate resulting in death or serious bodily injury.
>
> 13. On August 4, 1984, the officers responding to 701 West Park bypassed all actions recommended by contemporary accepted police practices, obtained very little information regarding the situation, and immediately went

> to the door heavily armed demanding that the door be opened. In my opinion, this action led to a shooting which could have been avoided had appropriate action been taken. This action constitutes the excessive use of force.

[CR 122, pp. 12-13]

As the Ninth Circuit dissenting opinion recognized, the expert opinions submitted by Scott raised a jury issue as to the reasonableness of the officers' conduct [*App.* 54 - 57]. Even the District Court concluded that the officers may have acted negligently - i.e., unreasonably - before granting summary judgment on the erroneous grounds that Scott was required to prove gross negligence to establish a Fourth Amendment violation [*App.* 8 - 9]. Although the expert opinions of Mr. Payne were one of the central pillars of Scott's arguments, having cited them at length in her initial appellate briefs and again in two of her three petitions for rehearing, the Ninth Circuit majority never once even mentioned the expert opinions of Scott's expert in any of its four opinions.

The Ninth Circuit majority's conclusion that the actions taken by the BSLEA officers were "hardly unreasonable" ingnored qualified expert testimony to the contrary, and in effect usurped the role of the trier of fact. It is improper for a court to award judgment as a matter of law in the face of expert testimony which raises a triable issue of fact. See, e.g., *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1318-19 (9th Cir. 1985); *Scharf v. United States Atty. Gen.*, 597 F.2d 1240, 1243 (9th Cir. 1979).

II. In View Of The Manual, The Circuit Court Erred In Ruling, As A Matter Of Law, That The Officers Acted In An Objectively Reasonable Manner In The Light Of Clearly Established Law, So As To Provide Them With Qualified Immunity.

A. The Ninth Circuit Decision

The Ninth Circuit majority also concluded that Respondents were entitled to judgment as a matter of law on the basis of qualified immunity. The basis for the decision on qualified immunity was identical to the reason cited for upholding summary judgment on Scott's purported inability to prove a violation of the Fourth Amendment. The majority concluded that the officers had, as a matter of law, acted reasonably [*App.* 48, 50]

B. Standards Of Review

The legal standards governing claims under the Fourth Amendment and governing the defense of qualified immunity are practically identical. In order to prove a Fourth Amendment claim, one must show that the police conduct was not "objectively reasonable." *Graham v. Conner*, 490 U.S. 386, 397 (1989). The defense of qualified immunity shields public officials from liability for constitutional violations, in claims brought under 42 U.S.C. §1983, where it is demonstrated that they have acted with "'objective legal reasonableness' ... in light of the legal rules that were 'clearly established' at the time ... ." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

Local rules and regulations are relevant to the issue of whether officers have violated "clearly established law" where those local rules or regulations form a basis for the constitutional claim at issue. *Davis v. Scherer*, 468 U.S. 183, 194, n. 12 (1984). See also, *Baker v. Racansky*, 887 F.2d 183, 189, n. 5 (9th Cir. 1989). In this case, the local rules and regulations set forth in the BSLEA Manual do form a basis for the constitutional claim of excessive force under the Fourth Amendment. As held in *Tennessee v. Garner*, 471 U.S. 1 (1985), "In evaluating the reasonableness of police procedures under the Fourth Amendment, we have also looked to the prevailing rules in individual jurisdictions." *Id.* at 15-16. Those prevailing local rules include interdepartmental policies adopted by the local police agencies themselves. *Id.* at 18-19.

C. Error Demonstrated By The Manual

There is no question but that the rules set forth in the BSLEA Manual were "clearly established" from the point of view of the officers in this case. The first page of the Manual, an order from the BSLEA sheriff addressed to "all personnel", states as follows:

> * * *
>
> The contents of this manual are to guide your judgments and actions taken in conformity with those judgments in carrying out the mission of the deparment. It is imperative that every member of the department understands the policies and procedures. * * *

[CR 66, Exh. 11]

Clearly, the officers involved in the John Scott shooting were required to know, understand and follow the rules and policies adopted in the BSLEA Manual relating to barricaded suspects, the use of force and the use of chemical agents. The record reflects that the officers failed to follow those rules and policies in numerous respects, or at a minimum raises a jury issue as to whether the officers violated those rules and policies. [See discussion at pp. 20 - 21, *supra.*] Thus, the terms of the Manual itself contradict the Ninth Circuit's conclusion that the officers' conduct comported with standards of "'objective legal reasonableness' ... in light of the legal rules that were 'clearly established'" - the standard which must be proven in order to establish the defense of qualified immunity. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). The Ninth Circuit erred in concluding that Respondents were entitled to qualified immunity.

CONCLUSION

The Ninth Circuit majority has expropriated the role of the jury by deciding questions of fact which are genuinely in dispute. The conclusion of the Ninth Circuit majority that the officers' conduct was "hardly unreasonable" is contradicted both by the terms of Respondents' own Manual and by competent expert testimony. The Ninth Circuit decision has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rule 10.1(a), S.Ct.R. Additionally, the Ninth Circuit decision has decided federal questions involving 42 U.S.C. §1983 in ways which conflict with applicable decisions of this Court. Rule 10.1(c), S.Ct.R.

Certiorari should be granted so that the award of summary judgment may be reversed and the case remanded for trial. Scott deserves her day in court.

Respectfully submitted this 18th day of April, 1995.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

DORIS A. SCOTT, Individually and as Personal Representative of the Estate of JOHN WILLIAM SCOTT, Deceased,

Plaintiff,

-vs-

JAMES L. HENRICH, DAVID J. FLAMAND, BUTTE-SILVER BOW LAW ENFORCEMENT AGENCY, CITY OF BUTTE, and COUNTY OF SILVER BOW,

Defendants.

No. CV-87-003-BU

MEMORANDUM AND ORDER

Filed January 3, 1991

Doris Scott prosecutes this 42 U.S.C. § 1983 action against Butte-Silver Bow County, Montana, police officers James L. Henrich and David J. Flamand, alleging the officers' use of excessive and deadly force to effect a seizure of her deceased husband, John Scott, violated John Scott's fourth amendment right to be free from

unreasonable seizures. The officers, however, respond that their resort to deadly force was objectively reasonable under the circumstances with which they were presented, and claim entitlement to qualified immunity from the claims advanced by Scott. The officers seek to establish their entitlement to qualified immunity by way of motion for summary judgment pursuant to Fed.R.Civ.P. 56.[1]

BACKGROUND

On August 4, 1984, numerous Butte-Silver Bow County, Montana, law enforcement officers, including Henrich and Flamand, responded to a call that an individual had discharged a firearm in the central city area of Butte, Montana. Upon their arrival at the location where the incident was believed to have occurred, Henrich and Flamand were advised by a local resident that the individual, who the resident believed had fired a rifle in the area, had entered a nearby apartment. With weapons drawn, Henrich and Flamand immediately approached the door of the apartment where they had been advised the perpetrator had entered. Armed with a shotgun, Flamand positioned himself to cover Henrich, who knocked, announced his identity, and demanded the door be opened. Both Henrich and Flamand have stated that when the door was opened in response to the announcement, the individual who appeared, later identified as John Scott, was in possession of a long barreled weapon. In the instant which followed, Henrich observed Scott raise the barrel of the

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[1] Scott has also advanced claims for relief under section 1983 against Butte-Silver Bow County, Montana, and the Butte-Silver Bow Law Enforcement Agency. The court previously stayed proceedings upon the issue of the County's liability pending resolution of the officers' motion for summary judgment. *Scott v. Henrich*, 700 F.Supp. 498 (D. Mont. 1988).

weapon toward him. By reflexive action, Henrich jerked away from the doorway, discharging his weapon wildly. Believing the suspect Scott had fired upon Henrich, Officer Flamand immediately fired his shotgun four times into the doorway. One of the shots fatally struck John Scott.

DISCUSSION

Whether the application of force is for the purpose of effecting an arrest or other stop, or for the purpose of self-defense, it is the acquisition of physical control by a law enforcement official that implicates the victim's fourth amendment interest to be free from unreasonable seizures. *See, Reed v. Hoy*, 909 F.2d 324, 329 (9th Cir. 1989), *petition for cert filed* (Oct. 16, 1990) (No. 625). Consequently, "all claims that law enforcement officers have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its' 'reasonableness' standard . . . ." *Graham v. Conner*, 490 U.S. 386, 109 S.Ct. 1865, 1871 (1989). Of course, "[t]he Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances . . . ." 109 S.Ct. at 1987. Because "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment," *Id.* at 1873, the lethal shooting of John Scott by Officer Flamand constituted a "seizure" subject to the proscription of the fourth amendment. *Reed v. Hoy, supra*, 909 F.2d at 329. Consistent with the rationale expressed by the Court in *Graham*, the ultimate inquiry to be made in assessing Scott's claim is whether Officer Flamand's resort to deadly force was objectively reasonable under the circumstances.

In *Tennessee v. Garner*, 471 U.S. 1 (1985), the Supreme Court set forth the circumstances under which law enforcement personnel may resort to the use of deadly force to effect a seizure. Although *Garner* specifically addressed the use of deadly force to prevent the escape of an unarmed suspected felon, the rationale is applicable to any seizure effected through the use of excessive or deadly force. The Court in *Garner* concluded that deadly force "may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or physical injury to the officer or others." 471 U.S. at 3. The Court's conclusion recognizes two prerequisites for the use of deadly force: First, the individual sought to be "seized" must pose a "significant threat." Second, the use of "deadly force" must be necessary, *i.e.*, did a reasonable non-deadly alternative exist for apprehending the individual? *See, Brower v. County of Inyo*, 884 F.2d 1316 at 1317-1318 (9th Cir. 1989). Both the "significant threat" and "necessity" inquiries are factual in nature. Consequently, in assessing whether the officers' are entitled to qualified immunity as a matter of law, the relevant question presented is whether a reasonable officer placed in the officers' respective positions, could reasonably have believed that the resort to deadly force to effect the seizure of John Scott was legal. *See, Thorstad v. Kelly*, 858 F.2d 571 (9th Cir. 1988); *see also, Anderson v. Creighton*, 483 U.S. 635 (1987). The inquiry may be rephrased as whether "any officer in the defendant's position, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct." *See, Brandenburg v. Cureton*, 882 F.2d 211, 215 (6th Cir. 1989) (*citing, Dominique v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987). "This purely objective determination of reasonableness must take into account the

tense, uncertain, and rapidly evolving nature of police work which requires split-second decision making with regard to the requisite amount of force to apply in a particular situation." *Rodriquez v. City of Passaic*, 730 F.Supp. 1314, 1322 (D. N.J. 1990), *citing, Graham v. Conner, supra*, 109 S.Ct. at 1872.

Officers Henrich and Flamand have supported their motion for summary judgment by admissible evidence, *i.e.*, sworn statements made by competent witnesses on personal knowledge which the court has previously determined would entitle them to judgment as a matter of law. *See, Scott v. Henrich*, 700 F.Supp. 498 (D.Mont. 1988). In accordance with Fed.R.Civ.P. 56(a), the court determined that it was incumbent upon Scott to rebut the offices' showing with evidence establishing the existence of a genuine issue of material fact for trial. *Id.* Scott was afforded the opportunity to pursue pretrial discovery in an effort to obtain evidence sufficient to rebut the officers' evidence establishing entitlement, in the first instance, to qualified immunity with respect to Scott's claim of excessive force. *Id.* at 509. Scott, however, has failed to sustain that burden.[2]

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[2] The allegations of Scott's complaint advance claims for relief under 42 U.S.C. § 1983 predicated upon a seizure accomplished without probable cause and with the use of excessive force. The court has previously addressed the viability of Scott's claim based upon the purported lack of probable cause by Officers Henrich and Flamand in *Scott v. Henrich and Flamand*, 700 F.Supp. at 503-505. The court concluded that upon their arrival at the scene, Officers Henrich and Flamand possessed probable cause to believe that an offense had been committed and that the person to be arrested would be found in the specific apartment where John Scott had retreated. *Id.* As to that aspect of Scott's complaint which alleged the officers lacked probable cause to effect a seizure of John Scott, the court observed that under the circumstances of the transaction, this claim was inextricably intertwined with the claim the officers utilized excessive force in effecting the seizure. Specifically, the court noted resolution of the probable cause issue and the excessive force issue turned upon the factual inquiry of whether Sergeant

Scott's initial opposition to the officers' motion for summary judgment was based primarily upon an attack to the credibility of the officers' sworn statements. However, as the court previously indicated, opposition raising merely a credibility issue is insufficient to preclude summary judgment. *Scott v. Henrich*, 700 F.Supp. at 508 (*citing, National Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95 (9th Cir. 1983); *Matter of Citizens Loan & Savings Co.*, 621 F.2d 911 (8th Cir. 1990)). Scott also suggested the existence of two facts which, in her opinion, precluded the entry of summary judgment: (1) subsequent testing of the gun purportedly held by John Scott at the time of the shooting failed to reveal the weapon bore traces of Scott's fingerprints and (2) John Scott was shot in the back. In assessing the viability of Scott's position, the court observed the expert testimony presented at the Coroner's inquest held, in connection with the death of John Scott and offered by Officers Henrich and Flamand in support of their motion for summary judgment, indicated that at the time of the shooting John Scott was facing, or standing somewhere between sideways and ten degrees forward to the shotgun fired by Officer Flamand. *Id.* This evidence was unopposed by Scott. As to the lack of discernible fingerprints upon the weapon purportedly held by John Scott, the court observed Scott offered no additional evidence from which in inference adverse to the evidence presented by Officers Henrich and Flamand could be drawn. *Id.* Cognizant of the fact that no percipient witnesses, other than officers Henrich and Flamand, existed who could provide evidence probative of the circumstances surrounding the shooting, the court deemed it

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Henrich observed John Scott in possession of a gun at the time he responded to the officer's announcement. Disposition of the final aspect of Scott's claim for relief predicated upon a lack of probable cause necessarily follows disposition of the excessive force claim.

essential to provide Scott the opportunity to garner the necessary expert testimony in support of her position. *Id.* at 309. "Expert testimony would be necessary for the trier of fact to legitimately draw the inference that a reasonable officer placed in the position of Henrich and Flamand would not have experienced such apprehension of the deadly force to which Officers Henrich and Flamand resorted." *Id.* at 508 (*citing, Neely v. St. Paul Fire & Marine Ins. Co.*, 584 F.2d 341, 345 (9th Cir. 1978).

Having been afforded the opportunity to conduct additional discovery, Scott presents no evidence, in the form of expert opinion, or any other evidence, sufficient to establish the existence of a genuine issue of material fact, that in light of the clearly established principles governing the use of deadly force to effect a seizure, Officers Henrich and Flamand could not reasonably have believed that the resort to the use of deadly force under the circumstances with which they were presented was lawful. Consequently, Officers Henrich and Flamand are entitled to immunity from the claim of Scott that the officers utilized excessive force in effecting the seizure of John Scott. *See, Anderson v. Creighton*, 483 U.S. 635; *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Additional points bear comment. The essence of Scott's claim, as reflected by the arguments she has presented throughout the proceedings, is that Officers Henrich and Flamand used poor tactical preparation in proceeding directly to the Scott apartment, thereby placing themselves in a situation that left them with no alternative but to use deadly force. Scott contends that by failing to develop even a semblance of a tactical plan Officers Henrich and Flamand acted in a grossly negligent fashion which renders them liable under

42 U.S.C. § 1983.[3] Scott has shown that Officers Henrich and Flamand did not consider all of the alternatives available to them.[4] Nonetheless, upon review of the evidence presented, and considering that evidence in the light most favorable to the plaintif, the decision of Henrich and Flamand to approach the door of the Scott apartment did not rise above mere negligence. The court is unable to conclude that the officers' decision was done "with disregard to a known risk or a risk so obvious that [they] must be assumed to have been aware of it, and of the magnitude such that it is highly probable that harm will follow." *Nishiyama v. Dixon County, Tennessee*, 814 F.2d 277, 282 (6th Cir. 1987) (*en banc*). Perhaps a more prudent course of procedure would have prevented the death of John Scott. Nonetheless, the fact a necessarily instantaneous decision by a police officer is not, in hindsight, the best, does not serve to elevate negligence o a constitutional plane. Any malfeasance that may be attributed to the conduct of Officers Henrich and Flamand does not rise to the level of "gross" negligence essential to a claim for deprivation of constitutional rights under 42 U.S.C. § 1983. Whether Officers Henrich and Flamand acted in a negligent fashion is, of

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[3] It is now settled that mere negligence will not give rise to a claim for deprivation of constitutional rights under 42 U.S.C. § 1983. *Daniels v. Williams*, 424 U.S. 327 (1986). "Gross" negligence, however, is sufficient to give rise to a claim for deprivation of constitutional rights under 42 U.S.C. § 1983. *See, Berquist v. County of Cochise*, 806 F.2d 1364, 1370 (9th Cir. 1986).

[4] Scott places particular emphasis upon the fact the officers did not follow the tactical plan established by the Butte-Silver Bow Law Enforcement Agency Manual of Policy and Procedure regarding the apprehension of a barricaded suspect. Additionally, Scott emphasizes that Officers Henrich and Flamand were not familiar with these requirements and had not been formally trained in the planned utilization. Scott asserts the officers' failure to implement the tactical response for barricaded suspects set forth in the manual constituted "gross" negligence.

course, an issue properly left to the trier of fact.

Having determined that Officers Henrich and Flamand did not resort to the use of excessive force in effecting the seizure of John Scott, no liability may be imposed upon the defendant governmental entities, Butte-Silver Bow County, and Butte-Silver Bow Law Enforcement Agency pursuant to 42 U.S.C. § 1983. *See, City of Los Angeles v. Heller*, 475 U.S. 796, 798-799 (1986).

Therefore, for the reasons set forth in the present memorandum, together with the Memorandum and Order previously entered by this court on November 17, 1988,

IT IS HEREBY ORDERED that the defendants' motions for summary judgment upon the claims advanced by the plaintiff pursuant to 42 U.S.C. § 1983, be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that the remaining claims of the plaintiff's complaint, which are claims based upon the substantive law of the State of Montana, be, and the same hereby are DISMISSED without prejudice.[5]

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[5] Where a federal claim essential to he court's jurisdiction under 28 U.S.C. § 1331 is dismissed before trial, dismissal of a pendent state claim is a matter vested in the discretion of the court. *See, United Mine Workers v. Gibbs*, 383 U.S. 715 (1966); *Hagans v. Lavine*, 415 U.S. 528 (1974). In the exercise of that discretion, the court finds the remaining claims which Scott advances against the named defendants are properly resolved in the courts of the State of Montana. The State of Montana recognizes its obligation to hold officers of the law responsible for their actions, and have implemented a remedy via the State Tort Claims Act. Whether Officers Henrich and Flamand, and the local governmental entities which employed those individuals, should be held liable for allegedly failing to follow a certain procedure in the apprehension of an individual suspected of criminal activity, presents an issue best resolved in the state forum. The court is further persuaded by the fact the plaintiff is not time-barred from pursuing her state claims in the Montana

The Clerk is directed to enter JUDGMENT accordingly.

DATED this 3rd day of January, 1991.

Hon. Paul G. Hatfield
PAUL G. HATFIELD, CHIEF UNITED
STATES DISTRICT COURT JUDGE

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courts. *See*, Mont. Code Ann. § 27-2-407; *Cassidy v. Finley*, 173 Mont. 475, 568 P.2d 142 (1977).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DORIS A. SCOTT, Individually And As Personal Representative For The Estate Of JOHN WILLIAM SCOTT, Deceased,

Petitioner-Appellant,

-vs-

JAMES L. HENRICH, DAVID J. FLAMAND, BUTTE-SILVER BOW LAW ENFORCEMENT AGENCY, CITY OF BUTTE, and COUNTY OF SILVER BOW,

Defendants-Appellees.

No. 91-35429

OPINION

Filed October 15, 1992

JUSTICE KOZINSKI delivered the opinion of the court:

Doris Scott contends that the police officer defendants acted unreasonably by killing her husband John Scott.[1] We consider the amount of proof needed to overcome a motion for summary

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[1] Plaintiff named other defendants in her complaint, but her claims against them are dependent on this claim and will become relevant only if we reverse.

judgment in a deadly force case.

Facts

Officers Flamand and Henrich were called to 701 West Park Street in Butte, Montana, in response to reports that a man was firing a gun there. A few minutes earlier, they had received reports of shots fired at a nearby address. When the officers arrived at the 701 West Park area, a motel manager pointed to the two-story apartment building across the street where the gunman had entered via one of the street-level doors. A boy named Jason Smith told Flamand that "he had seen a man fire a shot or a couple of shots . . . and that [the man] was acting strange or crazy and he was staggering." Flamand then observed a man in the second-story window of the building.

Flamand and Henrich quickly approached the street-level door. Henrich banged and kicked the door and yelled something to the effect of "Police, police officers, open up." Flamand stood behind Henrich and covered him. A few minutes later, Henrich again banged the door and identified himself as a police officer. The officers then heard fumbling with the lock of the door. The door opened, and John Scott stood in the doorway. According to the officers, Scott held a "long gun" and pointed it at them. Officer Henrich fired a shot that missed Scott. Officer Flamand, apparently believing Scott had fired this shot, fired four shots at Scott, one of which caused the fatal wound.

Discussion

I

Under the Fourth Amendment, police may use only such force as is objectively reasonable under the circumstances. *Graham v. Connor*, 490 U.S. 386, 397 (1989). An officer's use of *deadly* force is reasonable only if "the officer has probable cause to believe

that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3, (1985); *see also Graham*, 490 U.S. at 396 (one of factors in determining reasonableness is "whether the suspect poses an immediate threat to the safety of the officers or others"). All determinations of unreasonable force "must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97.

The officers here raise the defense of qualified immunity, which shields government officials performing discretionary functions from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "In Fourth Amendment unreasonable force cases, unlike in other cases, the qualified immunity inquiry is the same as the inquiry made on the merits." *Hopkins v. Andaya*, 958 F.2d 881, 885 n.3 (9th Cir. 1992). But, even though reasonableness traditionally is a question of fact for the jury, *see e.g., White v. Pierce County*, 797 F.2d 812, 816 (9th Cir. 1986); Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1179 (1991), defendants can still win on summary judgment if the district court concludes, after resolving all factual disputes in favor of the plaintiff, that the officer's use of force was objectively reasonable under the circumstances.

Deadly force cases pose a particularly difficult problem under this regime because the officer defendant is often the only surviving eyewitness. Therefore, the judge must ensure that the officer is not taking advantage of the fact that the witness most likely

to contradict his story - the person shot dead - is unable to testify. The judge must carefully examine all the evidence in the record, such as medical reports, contemporaneous statements by the officer and the available physical evidence, as well as any expert testimony proffered by the plaintiff, to determine whether the officer's story is internally consistent and consistent with other known facts. *Hopkins*, 958 F.2d at 885-88; *Ting v. United States*, 927 F.2d 1504, 1510-11 (9th Cir. 1991). In other words, the court may not simply accept what may be a self-serving account, but must exercise a fair degree of skepticism in determining whether the officer - as sole surviving witness and intensely interested party - is telling the truth.

II

A. Plaintiff initially argues that the officers should have used alternative measures before approaching and knocking on the door where Scott was located. But, as the text of the Fourth Amendment indicates, the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them. *See, e.g., Illinois v. Lafayette*, 462 U.S. 640, 647 (1983); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 n.12 (1976). Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the *least* intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the

exigencies of the moment.

Officers thus need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable. The officers here clearly did: It's hardly unreasonable for officers to take arms, knock on the door of an apartment and identify themselves as police when an armed man who, they are told, recently fired shots and is acting "crazy"[2] lurks inside.

B. As to the shooting itself, the initial question is whether Scott was holding a gun when he opened the door; if he wasn't, then the officers would not have been acting in self-defense, and thus the shooting would not have been reasonable.[3]

There's no internal inconsistency in the officers' statements, nor any inconsistency between them: Both Henrich and Flamand have unfailingly and forcefully stated they fired shots because they feared for their lives when the door opened and they saw Scott standing there with a gun pointed at them.[4] Because no other witnesses testified as to whether Scott held a gun, we must determine

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[2] In fact, Scott was drunk. Very, very drunk. He had a blood alcohol content of .312.

[3] Plaintiff has not contended in arguments to the district court or this court that Scott was not holding a gun. *See* Plaintiff's Supplemental Brief Opposing Summary Judgment (nowhere arguing that Scott may not have held a gun when he opened the door); Plaintiff's Opening Brief (same); *see also* Transcript of District Court Hearing of May 5, 1989, at 40. Nevertheless, as the question goes to the reasonableness of the officers' conduct, we will consider it. *Cf. Shah v. United States*, 878 F.2d 1156, 1163 (9th Cir. 1989).

[4] Neither officer has a history of excessive force. *Cf. Hopkins*, 958 F.2d at 884. In fact, the officers had not previously discharged a weapon at another person during their combined 24 years of police service. Transcript of Shooting Review Board Hearing of October 10-11, 1984, at 18, 30.

whether the record contains other evidence that contradicts the officers' story, or at least casts some doubt on it.

There is only one piece of evidence that could possibly raise a genuine issue of material fact as to whether Scott held a gun: No fingerprints of value were found during the subsequent examination f the gun Scott was allegedly holding.[5] Scott argues that a rational jury might infer from the absence of fingerprints that Scott wasn't holding the gun. But though we construe all facts and draw all inferences in favor of the non-moving party, in this case Scott, *Anderson v. Liberty Lobby*, 477 U.S. 242, 255-56 (1986), the record must be sufficient to let a rational factfinder find that the inference nonmovant suggests is more likely than not true. *City of Vernon v. Southern Cal. Edison Co.*, 955 F.2d 1361, 1369 (9th Cir. 1992), *pet. cert. filed*, 61 U.S.L.W. 3061 (July 20, 1992) (No. 92-122). A mere scintilla of evidence isn't enough. *Id.*

All Scott gives us is a scintilla. It's true that, in the popular mythology, people leave telltale fingerprints on everything they touch. But in real life that's just not so. Scott's fingers might not have had enough sweat on them to leave prints.[6] The gun's surface might have been too rough to take prints.[7] The smooth parts of the gun might have been too small to take prints sufficient for

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[5] Pictures of the crime scene show the gun lying on the floor next to Scott's dead body.

[6] This can easily happen when the seat has been rubbed off "by the frictional action when grasping a number of articles." Frederick R. Cherrill, The Finger Print System at Scotland Yard 113 (1954).

[7] "Some surfaces may be checked, milled, or otherwise rough, which makes the recovery of latent prints very difficult." Robert D. Olsen, Sr., Scott's Fingerprint Mechanics 416 (1978).

identification.[8] "Experience has shown that it is possible to examine quite a number of articles which have been recently handled with the result that there is a surprising lack of anything approaching even the suggestion of a finger mark."[9] The verdict of a jury can't rest on mere speculation or uneducated guess - which is all a jury could make in this case without expert testimony[10]- among several likely theories. *Neely v. St. Paul Fire & Marine Ins. Co.*, 584 F.2d 341, 345-46 (9th Cir. 1978) (that defendant's theory of the facts could possibly have been true isn't sufficient; "the connection between the proffered evidence and the conclusions urged is too tenuous to permit a jury to make it"); *Wolf v. Reynolds Elec. & Eng'g Co.*, 304 F.2d 646 (9th Cir. 1962).

The record does show, as plaintiff notes, that Scott's gun was unloaded at the time of the incident. But unless the officers knew or should have know this fact, it is irrelevant. Officers are entitled to assume, in the absence of clear evidence to the contrary, that weapons are loaded. *Cf. United States v. Martinez-Jimenez*, 864 F.2d 664, 666-67 (9th Cir.) (toy gun counts as dangerous weapon for purposes of federal bank robbery statute), *cert. denied*, 489 U.S.

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[8] Often, especially on guns, "[e]xposed smooth surfaces . . . are not large enough to take latent prints sufficient for identification, if the firearm is held in the normal manner for operation." *Id.*

[9] Cherill, *supra* note 6, at 112.

[10] Fingerprints are the paradigm example of evidence that is beyond the ken of lay jurors and thus requires expert testimony. See, *e.g., United States v. Huffhines*, 967 F.2d 314, 320 (9th Cir. 1992); *Cooper v. Dupnik*, 963 F.2d 1220, 1228 (9th Cir. 1992) (en banc), *pet. cert. filed*, 61 U.S.L.W. 3112 (Aug. 3, 1992) (No. 92-210); *United States v. Heffington*, 952 F.2d 275, 280 (9th Cir. 1991); *Mikes v. Borg*, 947 F.2d 353, 358 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3055 (1992); *Taylor v. Kincheloe*, 920 F.2d 599, 609 (9th Cir. 1990), all invoiving the use of experts to explain fingerprint evidence.

1099 (1989). Plaintiff has introduced no evidence that the police officers knew, or had reason to know, that Scott's gun was unloaded, nor do we find anything in the record suggesting that the officers were aware the gun was unloaded. Nothing in the record, therefore, casts doubt on the officers' assertion that they reasonably believed Scott posed a deadly threat at the moment he opened the door.

Plaintiff points out that the fatal bullet entered Scott's side area and asks us to infer that Scott was not facing the officers, and therefore not really in a position to shoot at them even if he was holding the gun. We are reluctant to second-guess police officers as to the exact orientation of someone who opens a door holding a gun after police have knocked and identified themselves. In any event, the autopsy pictures graphically show stippling (marks caused by glass particles or burning gunpowder) on Scott's stomach. It is thus clear that Scott was facing in the direction of one of the officers when that officer fired at least one of the bullets. *See also* Testimony of William Newhouse, Transcript of Coroner's Inquest of Oct. 23, 1984, at 75 ("the individual had to be facing that shotgun at one time or another with one of thos shots"). That the fatal bullet entered Scott's side proves only that Scott may not have been entirely motionless during the shooting.

In addition, there's no indication in the record that, during the few seconds of gunfire, a definite pause occurred where the perceived threat from Scott dissipated ---- in other words a moment where Scott threw down the gun or yelled "I surrender" or "Don't shoot." Thus, this is not a case where the threat abated and the officers had time to regroup ---- and *then* used deadly force despite the reduced threat. *Cf. Hopkins*, 958 F.2d at 886-87.

Plaintiff was not unfairly surprised or given insufficient time to some up with evidence in opposition to the motion for summary

judgment. The district court granted plaintiff a continuance to allow her to obtain further evidence on the reasonableness of the officers' shooting, but plaintiff failed to do so.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DORIS A. SCOTT, Individually And As Personal Representative For The Estate Of JOHN WILLIAM SCOTT, Deceased,

Petitioner-Appellant,

-vs-

JAMES L. HENRICH, DAVID J. FLAMAND, BUTTE-SILVER BOW LAW ENFORCEMENT AGENCY, CITY OF BUTTE, and COUNTY OF SILVER BOW,

Defendants-Appellees.

No. 91-35429

ORDER AND AMENDED OPINION

Filed May 21, 1993

JUSTICE KOZINSKI delivered the opinion of the court:

Doris Scott contends that the police officer defendants acted unreasonably by killing her husband John Scott.[1] We consider the amount of proof needed to overcome a motion for summary

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[1] Plaintiff named other defendants in her complaint, but her claims against them are dependent on this claim and will become relevant only if we reverse.

judgment in a deadly force case.

Facts

Officers Flamand and Henrich were called to 701 West Park Street in Butte, Montana, in response to reports that a man was firing a gun there. A few minutes earlier, they had received reports of shots fired at a nearby address. When the officers arrived at the 701 West Park area, a motel manager pointed to the two-story apartment building across the street where the gunman had entered via one of the street-level doors. A boy named Jason Smith told Flamand that "he had seen a man fire a shot or a couple of shots . . . and that [the man] was acting strange or crazy and he was staggering." Flamand then observed a man in the second-story window of the building.

Flamand and Henrich quickly approached the street-level door. Henrich banged and kicked the door and yelled something to the effect of "Police, police officer, open up." Flamand stood behind Henrich and covered him. A few minutes later, Henrich again banged the door and identified himself as a police officer. The officers then heard fumbling with the lock of the door. The door opened, and John Scott stood in the doorway. According to the officers, Scott held a "long gum" and pointed it at them. Officer Henrich fired a shot that missed Scott. Officer Flamand, apparently believing Scott had fired this shot, fired four shots at Scott, one of which caused the fatal wound.

Discussion

I

Under the Fourth Amendment, police may use only such force as is objectively reasonable under the circumstances. *Graham v. Connor*, 490 U.S. 386, 397 (1989). An officer's use of *deadly* force is reasonable only if "the officer has probable cause to believe

that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985); *see also Graham*, 490 U.S. at 396 (one of factors in determining reasonableness is "whether the suspect poses an immediate threat to the safety of the officers or others"). All determinations of unreasonable force "must embody allowance for the fact that police officers are often forced to make split-second judgment - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97.

The officers here raise the defense of qualified immunity, which shields government officials performing discretionary functions from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "In Fourth Amendment unreasonable force cases, unlike in other cases, the qualified immunity inquiry is the same as the inquiry made on the merits." *Hopkins v. Andaya*, 958 F.2d 881, 885 n.3 (9th Cir. 1992). But, even though reasonableness traditionally is a question of fact for the jury, *see, e.g., White v. Pierce County*, 797 F.2d 812, 816 (9th Cir. 1986); Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1179 (1991), defendants can still win on summary judgment if the district court concludes, after resolving all factual disputes in favor of the plaintiff, that the officer's use of force was objectively reasonable under the circumstances.

Deadly force cases pose a particularly difficult problem under this regime because the officer defendant is often the only surviving eyewitness. Therefore, the judge must ensure that the officer is not taking advantage of the fact that the witness most likely

to contradict his story - the person shot dead - is unable to testify. The judge must carefully examine all the evidence in the record, such as medical reports, contemporaneous statements by the officer and the available physical evidence, as well as any expert testimony proffered by the plaintiff, to determine whether the officer's story is internally consistent and consistent with other known facts. *Hopkins*, 958 F.2d at 885-88; *Ting v. United States*, 927 F.2d 1504, 1510-11 (9th Cir. 1991). In other words, the court may not simply accept what may be a self-serving account by the police officer. It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably.

II

A. Plaintiff initially argues that the officers should have used alternative measures before approaching and knocking on the door where Scott was located. But, as the text of the Fourth Amendment indicates, the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them. *See, e.g., Illinois v. Lafayette*, 462 U.S. 640, 647 (1983); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 n.12 (1976). Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the *least* intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and

themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment.

Officers thus need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable. The officers here clearly did: It's hardly unreasonable for officers to take arms, knock on the door of an apartment and identify themselves as police when an armed man who, they are told, recently fired shots and is acting "crazy"[2] lurks inside.

B. Scott also argues the police officers' conduct violated police department guidelines for dealing with barricaded suspects. Under these guidelines, Scott contends, Henrich and Flamand shouldn't have tried to seize Scott immediately, but should instead have developed a tactical plan to deal with the situation, sealed the possible escape avenue, called for assistance, and tried to get Scott to surrender.

It's not clear whether self-imposed police guidelines are relevant to whether a seizure is reasonable. *Cf. Reed v. Hoy*, 909 F.2d 324, 330 n.5 (9th Cir. 1989) (state law can be relevant to reasonableness of seizure); *Maddox v. City of Los Angeles*, 792 F.2d 1408, 1414 (9th Cir. 1986) (rules promulgated by Los Angeles Police Commission, a local civilian oversight body, can be relevant). But if such guidelines are relevant, it's only when they're meant to protect the person being seized. If a police department bans chokeholds to protect people from being choked, *see Maddox*, 792 F.2d at 1414, or restricts use of deadly force to protect suspects from being shot

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[2] In fact, Scott was drunk. Very, very drunk. He had a blood alcohol content of .312.

unnecessarily, *see Reed*, 909 F.2d at 330 n.5, this might be germane to a reasonableness inquiry. But if, say, the department bans high-speed chases in order to save gas, or to protect bystanders, someone arrested after an unauthorized chase can't complain about the violation of a rule not intended for his benefit.[3]

Both the language of the guidelines and the context in which they appear in the police manual show they were meant to safeguard the police and other innocent parties, not the suspect. (In fact, they say: "Policy: A barricaded suspect poses an extreme danger to officers who try to arrest him, as well as [ ] other people. . . . It is important to minimize the possibility of injury to the public and officers." ER E at 16.) A police violation of these guidelines might be deserving of discipline, but it's irrelevant to Scott's case.

C. As to the shooting itself, the initial question is whether Scott was holding a gun when he opened the door; if he wasn't, then the officers would not have been acting in self-defense, and thus the shooting would not have been reasonable.[4]

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[3] It's sometimes not entirely clear whom certain rules were meant to benefit, but one can generally figure this out with some degree of confidence. In fact, we ask the same question in several analogous contexts. *See, e.g.*, E. Allan Farnsworth, Contracts 388 (2d ed. 1990) (contract unenforceable as against public policy may still be enforced if the claimant belongs to the class the public policy is designed to protect); *Norse v. Henry Holt and Co.*, No. 91-16824, slip op. 3761, 3770 (9th Cir. Apr. 16, 1993) (third party may enforce contract if it was intended for his benefit); Prosser and Keeton on the Law of Torts 224-25 (5th ed. 1984) (defendant's violation of statute may be negligence per se, but only if plaintiff was part of the class the statute was meant to protect).

[4] Plaintiff has not contended in arguments to the district court or this court that Scott was not holding a gun. *See* Plaintiff's Supplemental Brief Opposing Summary Judgment (nowhere arguing that Scott may not have held a gun when he opened the door); Plaintiff's Opening Brief (same); *see also* Transcript of District Court Hearing of May 5, 1989, at 40. Nevertheless, as the question goes to the reasonableness of the officers' conduct, we will consider it. *Cf. Shah v. United*

There's no internal inconsistency in the officers' statements, nor any inconsistency between them: Both Henrich and Flamand have unfailingly and forcefully stated they fired shots because they feared for their lives when the door opened and they saw Scott standing there with a gun pointed at them.[5] Because no other witnesses testified as to whether Scott held a gun, we must determine whether the record contains other evidence that contradicts the officers' story, or at least casts some doubt on it.

There is only one piece of evidence that could possibly raise a genuine issue of material fact as to whether Scott held a gun: No fingerprints of value were found during the subsequent examination of the gun Scott was allegedly holding.[6] Scott argues that a rational jury might infer from the absence of fingerprints that Scott wasn't holding a gun. But though we construe all facts and draw all inferences in favor of the non-moving party, in this case Scott, *Anderson v. Liberty Lobby*, 477 U.S. 242, 255-56 (1986), the record must be sufficient to let a rational factfinder find that the inference nonmovant suggests is more likely than not true. *City of Vernon v. Southern Cal. Edison Co.*, 955 F.2d 1361, 1369 (9th Cir. 1992), *pet. cert. filed*, 61 U.S.L.W. 3061 (July 20, 1992) (No. 92-122). A mere scintilla of evidence isn't enough. *Id.*

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States, 878 F.2d 1156, 1163 (9th Cir. 1989).

[5] Neither officer has a history of excessive force. *Cf. Hopkins*, 958 F.2d at 884. In fact, the officers had not previously discharged a weapon at another person during their combined 24 years of police service. Transcript of Shooting Review Board Hearing of Oct. 10-11, 1984, at 18, 30.

[6] Pictures of the crime scene show the gun lying on the floor next to Scott's dead body.

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[9] Often, especially on guns, "[e]xposed smooth surfaces . . . are not large enough to take latent prints sufficient for identification, if the firearm is held in the normal manner for operation." *Id.*

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[11] Fingerprints are the paradigm example of evidence that is beyond the ken of lay jurors and thus requires expert testimony. See, *e.g.*, *United States v. Huffhines*, 967 F.2d 314, 320 (9th Cir. 1992); *Cooper v. Dupnik*, 963 F.2d 1220, 1228 (9th Cir. 1992) (en banc), *pet. cert. filed*, 61 U.S.L.W. 3112 (Aug. 3, 1992) (No. 92-210); *United States v. Heffington*, 952 F.2d 275 280 (9th Cir. 1991); *Mikes v. Borg*, 947 F.2d 353, 358 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3055 (1992); *Taylor v. Kincheloe*, 920 F.2d 599, 609 (9th Cir. 1990), all involving the use of experts to explain fingerprint evidence.

possibly have been true isn't sufficient; "the connection between the proffered evidence and the conclusions urged is too tenuous to permit a jury to make it"); *Wolf v. Reynolds Elec. & Eng'g Co.*, 304 F.2d 646, 649 (9th Cir. 1962).

The record does show, as plaintiff notes, that Scott's gun was unloaded at the time of the incident. But unless the officers knew or should have known this fact, it is irrelevant. Officers are entitled to assume, in the absence of clear evidence to the contrary, that weapons are loaded. *Cf. United States v. Marteniz-Jimenez*, 864 F.2d 664, 666-67 (9th Cir.) (toy gun counts as dangerous weapon for purposes of federal bank robbery statute), *cert. denied*, 489 U.S. 1099 (1989). Plaintiff has introduced no evidence that the police officers knew, or had reason to know, that Scott's gun was unloaded, nor do we find anything in the record suggesting that the officers were aware the gun was unloaded. Nothing in the record, therefore, casts doubt on the officers' assertion that they reasonably believed Scott posed a deadly threat at the moment he opened the door.

Plaintiff points out that the fatal bullet entered Scott's side area and asks us to infer that Scott was not facing the officers, and therefore not really in a position to shoot at them even if he was holding the gun. We are reluctant to second-guess police officers as to the exact orientation of someone who opens a door holding a gun after police have knocked and identified themselves. In any event, the autopsy pictures graphically show stippling (marks caused by glass particles or burning gunpowder) on Scott's stomach. It is thus clear that Scott was facing in the direction of one of the officers when that officer fired at least one of the bullets. *See also* Testimony of William Newhouse, Transcript of Coroner's Inquest of Oct. 23, 1984, at 75 ("the individual had to be facing that shotgun at one time or another with one of those shots"). That the fatal bullet entered

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Plaintiff was not unfairly surprised or given insufficient time to come up with evidence in opposition to the motion for summary judgment. The district court granted plaintiff a continuance to allow her to obtain further evidence on the reasonableness of the officers' shooting, but plaintiff failed to do so.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DORIS A. SCOTT, Individually And As Personal Representative For The Estate Of JOHN WILLIAM SCOTT, Deceased,

Petitioner-Appellant,

-vs-

JAMES L. HENRICH, DAVID J. FLAMAND, BUTTE-SILVER BOW LAW ENFORCEMENT AGENCY, CITY OF BUTTE, and COUNTY OF SILVER BOW,

Defendants-Appellees.

No. 91-35429

OPINION

Filed September 9, 1994

JUSTICE KOZINSKI delivered the opinion of the court:

Doris Scott contends that the police officer defendants acted unreasonably by killing her husband John Scott.[1] We consider the amount of proof needed to overcome a motion for summary

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[1] Plaintiff atso names as defendants the Butte-Silver Bow Law Enforcement Agency, the City of Butte, and the County of Silver Bow. We address the claims against these defendants in section III *infra*

judgment in a deadly force case under section 1983.

Facts

Officers Flamand and Henrich were called to 701 West Park Street in Butte, Montana, in response to reports that a man was firing a gun there. A few minutes earlier, they had received reports of shots fired at a nearby address. When the officers arrived at the 701 West Park area, a motel manager pointed to the two-story apartment building across the street where the gunman had entered via one of the street-level doors. A boy named Jason Smith told Flamand that "he had seen a man fire a shot or a couple of shots . . . and that [the man] was acting strange or crazy and he was staggering ." Flamand then observed a man in the second-story window of the building.

Flamand and Henrich quickly approached the street-level door. Henrich banged and kicked the door and yelled something to the effect of "Police, police officers, open up." Flamand stood behind Henrich and covered him. A few minutes later, Henrich again banged the door and identified himself as a police officer. The officers then heard fumbling with the lock of the door. The door opened, and John Scott stood in the doorway. According to the officers, Scott held a "long gun" and pointed it at them. Officer Henrich fired a shot that missed Scott. Officer Flamand, apparently believing Scott had fired this shot, fired four shots at Scott, one of them caused the fatal wound.

Discussion

I

Under the Fourth Amendment, police may use only such force as is objectively reasonable under the circumstances. *Graham v. Connor*, 490 U.S. 386, 397 (1989). An officer's use of *deadly* force is reasonable only if "the officer has probable cause to believe

that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985); *see also Graham*, 490 U.S. at 396 (one of factors in determining reasonableness is "whether the suspect poses an immediate threat to the safety of the officers or others"). All determinations of unreasonable force "must embody allowance for the fact that police officers are often forced to make split-second judgment - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97.

The officers here raise the defense of qualified immunity, which shields government officials performing discretionary functions from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "In Fourth Amendment unreasonable force cases, unlike in other cases, the qualified immunity inquiry is the same as the inquiry made on the merits." *Hopkins v. Andaya*, 958 F.2d 881, 885 n.3 (9th Cir. 1992). But, even though reasonableness traditionally is a question of fact for the jury, *see, e.g., White v. Pierce County*, 797 F.2d 812, 816 (9th Cir. 1986); Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1179 (1991), defendants can still win on summary judgment if the district court concludes, after resolving all factual disputes in favor of the plaintiff, that the officer's use of force was objectively reasonable under the circumstances.

Deadly force cases pose a particularly difficult problem under this regime because the officer defendant is often the only surviving eyewitness. Therefore, the judge must ensure that the officer is not taking advantage of the fact that the witness most likely

to contradict his story - the person shot dead - is unable to testify. The judge must carefully examine all the evidence in the record, such as medical reports, contemporaneous statements by the officer and the available physical evidence, as well as any expert testimony proffered by the plaintiff, to determine whether the officer's story is internally consistent and consistent with other known facts. *Hopkins*, 958 F.2d at 885-88; *Ting v. United States*, 927 F.2d 1504, 1510-11 (9th Cir. 1991). In other words, the court may not simply accept what may be a self-serving account by the police officer. It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably.

II

A. Plaintiff initially argues that the officers should have used alternative measures before approaching and knocking on the door where Scott was located. But, as the text of the Fourth Amendment indicates, the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them. *See, e.g., Illinois v. Lafayette*, 462 U.S. 640, 647 (1983); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 n. 12 (1976). Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the *least* intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and

themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment.

Officers thus need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable. The officers here clearly did: It's hardly unreasonable for officers to take arms, knock on the door of an apartment and identify themselves as police when an armed man who, they are told, recently fired shots and is acting "crazy"[2] lurks inside.

B. Scott also argues the police officers' conduct violated police department guidelines for dealing with barricaded suspects. Under these guidelines, Scott contends, Henrich and Flamand shouldn't have tried to seize Scott immediately, but should instead have developed a tactical plan to deal with the situation, sealed the possible escape avenues, called for assistance, and tried to get Scott to surrender.

Assuming internal police guidelines are relevant to determining whether use of force is objectively reasonable, *see Tennessee v. Garner*, 471 U.S. 1, 18-19 (1985), they are relevant only when one of their purposes is to protect the individual against whom force is used. Thus, if a police department limits the use of chokeholds to protect suspects from being fatally injured, *see Maddox v. City of Los Angeles*, 792 F.2d 1408, 1414 (9th Cir. 1986), or restricts the use of deadly force to protect suspects from being shot unnecessarily, *see Garner*, 471 U.S. at 18-19, such regulations are germane to the reasonableness inquiry in an excessive force

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claim. But if, for example, the department bans high-speed chases in order to save gas, or to protect bystanders, a suspect arrested after an unauthorized chase can't complain about the violation of a rule not intended for his benefit.[3]

Both the guidelines at issue here and the context in which they appear in the police manual show they were meant to safeguard the police and other innocent parties, not the suspect. They state: "Police: A barricaded suspect poses an extreme danger to officers who try to arrest him, as well as [ ] other people. . . . It is important to minimize the possibility of injury to the public and officers." ER E at 16. A violation of these guidelines might be deserving of discipline, but it's irrelevant to Scott's case.

C. As to the shooting itself, the initial question is whether Scott was holding a gun when he opened the door; if he wasn't, then the officers would not have been acting in self-defense, and thus the shooting would not have been reasonable.[4]

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[3] It's sometimes not entirely clear whom certain rules were meant to benefit, but one can generally figure this out with some degree of confidence. In fact, we ask the same question in several analogous contexts. See, e.g., Norse v. Henry Holt and Co., 991 F.2d 563, 568 (9th Cir. 1993) (third party may enforce contract only if it was intended for his benefit); E. Allan Farnsworth, *Contracts* 388 (2d ed. 1990) (contract unenforceable as against public policy may still be enforced if the claimant belongs to the class the public police is designed to protect); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 224-25 (5th ed. 1984) (defendant's violation of a statute may be negligence per se, but only if plaintiff was part of the class the statute was meant to protect).

[4] Plaintiff has not contended in arguments to the district court or this court that Scott was not holding a gun. *See* Plaintiff's Supplemental Brief Opposing Summary Judgment (nowhere arguing that Scott may not have held a gun when he opened the door); Plaintiff's Opening Brief (same); *see also* Transcript of District Court Hearing of May 5, 1989, at 40. Nevertheless, as the question goes to the reasonableness of the officers' conduct, we will consider it. *Cf. Shah v. United States*, 878 F.2d 1156, 1163 9th Cir. 1989).

There's no internal inconsistency in the officers' statements, nor any inconsistency between them: Both Henrich and Flamand have unfailingly and forcefully stated they fired shots because they feared for their lives when the door opened and they saw Scott standing there with a gun pointed at them.[5] Because no other witnesses testified as to whether Scott held a gun, we must determine whether the record contains other evidence that contradicts the officers' story, or at least casts some doubt on it.

There is only one piece of evidence that could possibly raise a genuine issue of material fact as to whether Scott held a gun: No fingerprints of value were found during the subsequent examination of the gun Scott was allegedly holding.[6] Scott argues that a rational jury might infer from the absence of fingerprints that Scott wasn't holding a gun. But, though we construe all facts and draw all inferences in favor of the non-moving party, *Anderson v. Liberty Lobby*, 477 U.S. 242, 255-56 (1986), the record must be sufficient to let a rational factfinder find that the inference nonmovant suggests is more likely than not true. *City of Vernon v. Southern Cal. Edison Co.*, 955 F.2d 1361, 1369 (9th Cir. 1992), *pet. cert. filed*, 61 U.S.L.W. 3061 (July 20, 1992) (No. 92-122). A mere scintilla of evidence isn't enough. *Id.*

All Scott gives us is a scintilla. It's true that, in the popular mythology, people leave telltale fingerprints on everything they

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[5] Neither officer has a history of excessive force. *Cf. Hopkins*, 958 F.2d at 884. In fact, the officers had not previously discharged a weapon at another person during their combined 24 years of police service. Transcript of Shooting Review Board Hearing of October 10-11, 1984, at 18, 30.

[6] Pictures of the crime scene show the gun lying on the floor next to Scott's dead body.

touch. But in real life that's just not so. Scott's fingers might not have had enough sweat on them to leave prints.[7] The fun's surface might have been too rough to take prints.[8] The smooth parts of the gun might have been too small to take prints sufficient for identification.[9] "Experience has shown that it is possible to examine quite a number of articles which have been recently handled with the result that there is a surprising lack of anything approaching even the suggestion of a finger mark."[10] The verdict of a jury can't rest on mere speculation or uneducated guess - which is all a jury could make in this case without expert testimony"[11] - among several likely theories. *Neely v. St. Paul Fire & Marine Ins. Co.*, 584 F.2d 341, 345-46 (9th Cir. 1978) (that defendant's theory of the facts could possibly have been true isn't sufficient; "the connection between the

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[7] This can easily happen when the sweat has been rubbed off "by the frictional action when grasping a number of articles." Frederick R. Cherrill, The Finger Print System at Scotland Yard 113 (1954).

[8] "Some surfaces may be checked, milled, or otherwise rough, which makes the recovery of latent prints very difficult." Robert D. Olsen, Sr., Scott's Fingerprint Mechanics 416 (1978).

[9] Often, especially on guns, "[e]xposed smooth surfaces . . . are not large enough to take latent prints sufficient for identification, if the firearm is held in the normal manner for operation." *Id.*

[10] Cherrill, *supra* note 7, at 112.

[11] Fingerprints are the paradigm example of evidence that is beyond the ken of lay jurors and thus requires expert testimony. See, *e.g.*, *United States v. Huffhines*, 967 F.2d 314, 320 (9th Cir. 1992); *Cooper v. Dupnik*, 963 F.2d 1220, 1228, (9th Cir. 1992) (en banc), *pet. cert. filed*, 61 U.S.L.W. 3112 (Aug. 3, 1992) (No. 92-210); *United States v. Heffington*, 952 F.2d 275, 280 (9th Cir. 1991); *Mikes v. Borg*, 947 F.2d 353, 358 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 3055 (1992); *Taylor v. Kincheloe*, 920 F.2d 599, 609 (9th Cir. 1990), all involving the use of experts to explain fingerprint evidence.

proffered evidence and the conclusions urged is too tenuous to permit a jury to make it"); *Wolf v. Reynolds Elec. & Eng'g Co.*, 304 F.2d 646, 649 (9th Cir. 1962).

The record does show, as plaintiff notes, that Scott's gun was unloaded at the time of the incident. But unless the officers knew of should have known this fact, it is irrelevant. Officers are entitled to assume, in the absence of clear evidence to the contrary, that weapons are loaded. *Cf. United States v. Martinez-Jimenez*, 864 F.2d 664, 666-67 (9th Cir.) (toy gun counts as dangerous weapon or purposes of federal bank robbery statute), *cert. denied*, 489 U.S. 1099 (1989). Plaintiff has introduced no evidence that the police officers knew, or had reason to know, that Scott's gun was unloaded, nor do we find anything in the record suggesting that the officers were aware the gun was unloaded. Nothing in the record, therefore, casts doubt on the officers' assertion that they reasonably believed Scott posed a deadly threat at the moment he opened the door.

Plaintiff points out that the fatal bullet entered Scott's side area and asks us to infer that Scott was not facing the officers, and therefore not really in a position to shoot at them even if he was holding the gun. We are reluctant to second-guess police officers as to the exact orientation of someone who opens a door holding a gun after police have knocked and identified themselves. In any event, the autopsy pictures graphically show stippling (marks caused by glass particles or burning gunpowder) on Scott's stomach. It is thus clear that Scott was facing in the direction of one of the officers when that officer fired at least one of the bullets. *See also* Testimony of William Newhouse, Transcript of Coroner's Inquest of Oct. 23, 1984, at 75 ("the individual had to be facing that shotgun at one time or another with one of those shots"). That the fatal bullet entered

Scott's side proves only that Scott may not have been entirely motionless during the shooting.

In addition, there's no indication in the record that, during the few seconds of gunfire, a definite pause occurred where the perceived threat from Scott dissipated - in other words a moment where Scott threw down the gun or yelled "I surrender" or "Don't shoot." Thus, this is not a case where the threat abated and the officers had time to regroup - and *then* used deadly force despite the reduced threat. *Cf. Hopkins*, 958 F.2d at 886-87.

Plaintiff was not unfairly surprised or given insufficient time to come up with evidence in opposition to the motion for summary judgment. The district court granted plaintiff a continuance to allow her to obtain further evidence on the reasonableness of the officers' shooting, but plaintiff failed to do so.

III

Scott contends that even if the conduct of the individual officers was objectively reasonable, the municipal defendants may still face liability under *City of Canton v. Harris*, 489 U.S. 378 (1989). While the liability of municipalities doesn't turn on the liability of individual officers, it is contingent on a violation of constitutional rights. Here, the municipal defendants cannot be held liable because no constitutional violation occurred. As noted above, the actions of Officers Flamand and Henrich at all times were reasonable and proper: Both their initial decision to enter the building and their subsequent use of force fully complied with the requirements of the Fourth Amendment. Unlike the situation in *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992), there was no violation of the decedent's constitutional rights, and thus no basis for finding the officers inadequately trained. Scott's claims against the municipal defendants must therefore be dismissed. *See City of Los*

Angeles v. Heller, 475 U.S. 796, 799 (1986) (per curiam) ("[N]either *Monell* . . . nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when . . . the officer inflicted no constitutional harm.").

AFFIRMED.

NORRIS, J., dissenting:

John Scott lived in a two-story apartment house in a residential neighborhood in Butte, Montana. On August 4, 1984, Mr. Scott had attempted to evict some troublesome tenants. Twice that day, Mr. Scott called the Butte-Silver Bow Law Enforcement Agency complaining of disturbances caused by these tenants. Among the police officers who responded to the calls and talked to Scott in person was Officer James Henrich. Later the same day, a neighbor called the police and reported hearing gunshots in front of Mr. Scott's building. When Officers Henrich and David Flamand of the Butte-Silver Bow Law Enforcement Agency responded to the call, they were informed that the man who allegedly fired the shots was acting "crazy" and had entered a nearby apartment.

As the District Court described the scene, the officers, with "weapons drawn . . . immediately approached the door of the apartment where they had been advised the perpetrator had entered." *Scott v. Henrich*, Memorandum and Order (No. CV-87-003-BU) (January 3, 1991), p. 2-3. The officers then "banged and kicked the door and yelled . . . 'Police, police officers, open up.'" Majority Opinion, at 10827. A man, later identified as John Scott, opened the door holding a gun. Believing Scott had raised his weapon, Officer

Henrich fired a shot. Officer Flamand then fired four shots into the doorway because he believed the initial shot fired came from Scott's weapon rather than from his partner's. One of his shots killed Mr. Scott. His widow, Doris A. Scott, sued on a theory that her husband's death was caused by an excessive use of force.

On appeal, faced with the harsh reality of her deceased husband's unavailability to testify, Mrs. Scott has abandoned her opposition t summary judgment based on what occurred after the officers assaulted the door. Instead, Mrs. Scott relies solely on her alternative summary judgment theory that focusses on the interval of time *before* the officers assaulted the door. The premise of this theory is that the officers used excessive force by creating an unreasonable risk of armed confrontation with Mr. Scott when they stormed the door without first trying to defuse a potentially deadly situation.

The majority dismisses Mrs. Scott's appellate argument with the simply statement that "the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them." Majority Opinion, at 10829. The majority, however, mischaracterizes Mrs. Scott's argument. She does not argue, as the majority says, that "the officers should have used alternative measures," but rather that the alternative they did choose was objectively unreasonable. The cases the majority cites are inapposite because they hold only that the availability of less intrusive alternatives does not make otherwise reasonable police conduct unreasonable. *See Illinois v. Lafayette*, 462 U.S. 640, 647 (1983); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 n.12 (1976); *Cady v. Dombrowski*, 443 U.S. 433, 447 (1973) (the availability of less intrusive means does not "by itself, render [the police action] unreasonable"). Mrs. Scott does not argue that the

officers' conduct was less reasonable than the alternatives. She argues simply that the decision to rush the door immediately was itself unreasonable because it created an unnecessarily high risk of an armed confrontation. *See, e.g., Alexander v. City and County of San Francisco,* 92-16751, slip. op. at 7494 (9th Cir., July 8, 1994, Kozinski J., concurring) ("I seriously doubt a reasonable judicial officer would have authorized the immediate storming of [plaintiff's] residence by a heavily armed tactical team. Instead, he might have required exhaustion of less intrusive alternatives, like using tear gas or waiting [the plaintiff] out").

After summarily dismissing Mrs. Scott's appellate argument, the majority then devotes its entire opinion to the argument she abandoned on appeal: whether there was sufficient evidence to raise a triable issue of fact whether Mr. Scott was pointing a gun at the two officers when he opened the door. Without her deceased husband's testimony, Mrs. Scott does not contend on appeal that her husband was unarmed when he opened the door, that the police had reason to know the gun was unloaded, or that he had his back turned to the police throughout the duration of the encounter. Instead, Mrs. Scott argues simply that by assaulting the door with guns drawn, without first trying to coax her husband into coming out of his apartment peacefully, they created an unreasonable risk of armed confrontation. *See* Brief of Appellant, at 33-34; Reply Brief of Appellant, at 13-15.

In opposition to the summary judgment motion, Mrs. Scott filed a detailed affidavit in which an expert witness expressed the opinion that the officers' conduct created an unreasonable risk of armed confrontation. The expert testified that by rushing the door heavily armed, the officers clearly violated the internal police guidelines of the Butte-Silver Bow Law Enforcement Agency. He

cites the following guideline:

> A barricaded suspect poses an extreme danger . . . . Officers should not immediately flush a barricaded suspect. Rather they should develop and proceed with a tactical plan. Officers should seal off avenues of escape and call for assistance. When a suspect is isolated, time is normally on the side of the officers. . . . All efforts should be made to persuade the suspect to surrender before force is used.

See Payne Affidavit, CR 122, Exh. E, at 16 (quoting Butte-Silver Bow Law Enforcement Agency Manual). The expert explained that Officers Henrich and Flamand should not have tried to flush Mr. Scott out immediately, but instead should have developed a tactical plan, sealed possible escape paths, called for back up, and tried to coax Scott into surrendering. *See* Payne Affidavit, CR 122, Exh. E, at 14-17.

Internal police regulations and guidelines are relevant to the question of the reasonableness of the force officers use in apprehending suspects. *See Tennessee v. Garner*, 471 U.S. 1, 18-19 (1985) (considering police department policies as relevant in deciding the constitutionality of the use of deadly force); *Maddox v. City of Los Angeles*, 792 F.2d 1408, 1414 (9th Cir. 1986) (considering the rules promulgated by the Los Angeles Police Commission, a local civilian oversight body, in determining whether a police choke-hold was reasonably applied); *Peraza v. Delameter*, 722 F.2d 1455, 1456 9th Cir. 1984) (approving use of police department's canine policy as evidence). The majority holds these

guidelines to be irrelevant here because the guidelines were intended to protect police officers not suspects such as Mr. Scott. Majority Opinion, at 10839. This holding is contradicted by the deposition testimony of Undersheriff Lee that the guidelines are meant, at least in part, to protect the safety of the suspect. *See* Second Petition for Rehearing, at 2-4. Thus, at the very least, Undersheriff Lee's testimony creates a triable issue of fact as to whether the guidelines are in fact relevant.

Mrs. Scott's expert further opined that not only did the officers' conduct violate Butte-Silver Bow Law Enforcement Agency's guidelines, they also violated contemporary police practices:

> Contemporary accepted police practices recognize that immediate entry into a dwelling or other building for an armed suspect should only be attempted if there are hostages and one has information that a hostage may die or be seriously injured if one does not act immediately.

Id. at 12. The expert emphasized that under contemporary police practices, the officers should have gathered more intelligence about the identity of the person, his intentions, and his mental state. *See id.* at 11-12. If the officers had paused to ask just a few questions, stated the expert, they could have learned that "Mr. Scott was the landlord, that he had been drinking with [the evicted tenants], that he was fearful of them, that he had been threatened by them, and would have been happy to have the police on hand." *Id.* at 13. Since "[p]assage of time, without immediate resort to an assault tactic, could have diffused [sic] this situation." the expert stated that it was

unreasonable for the officers to storm the door without first using a telephone or a bullhorn to try to get Scott to surrender. *Id.*

Viewing the evidence, especially the expert's affidavit, in a light most favorable to Mrs. Scott, *see Retail Clerks Union Local 648 v. Hub Pharmacy, Inc.*, 707 F.2d 1030, 1033 (9th Cir. 1983), I believe there are triable issues of fact whether it was reasonable to storm the door without first pursuing less confrontational alternatives.

It is true that defendants have offered deposition testimony from law enforcement officers that Officers Henrich and Flamand reacted in accordance with departmental guidelines and conventional police practices. However, Scott's expert specifically controverts such testimony and thereby creates a battle of experts on a material issue of fact, which cannot be decided at summary judgment as a matter of law. *See Act Up!/ Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993) ("If a genuine issue of fact exists preventing a determination of qualified immunity at summary judgment, the case must proceed to trial.").

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DORIS A. SCOTT, Individually And As Personal Representative For The Estate Of JOHN WILLIAM SCOTT, Deceased,

Petitioner-Appellant,

-vs-

JAMES L. HENRICH, DAVID J. FLAMAND, BUTTE-SILVER BOW LAW ENFORCEMENT AGENCY, CITY OF BUTTE, and COUNTY OF SILVER BOW,

Defendants-Appellees.

No. 91-35429

ORDER AND OPINION

Filed November 2, 1994

JUSTICE KOZINSKI delivered the opinion of the court:

Doris Scott contends that the police officer defendants acted unreasonably by killing her husband John Scott.[1] We consider the

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[1] Plaintiff also names as defendants the Butte-Silver Bow Law Enforcement Agency, the City of Butte, and the County of Silver Bow. We address the claims against these defendants in section III *infra*.

amount of proof needed to overcome a motion for summary judgment in a deadly force case under section 1983.

Facts

Officers Flamand and Henrich were called to 701 West Park Street in Butte, Montana, in response to reports that a man was firing a gun there. A few minutes earlier, they had received reports of shots fired at a nearby address. When the officers arrived at the 701 West Park area, a motel manager pointed to the two-story apartment building across the street where the gunman had entered via one of the street-level doors. A boy named Jason Smith told Flamand that "he had seen a man fire a shot or a couple of shots . . . and that [the man] was acting strange or crazy and he was staggering." Flamand then observed a man in the second-story window of the building.

Flamand and Henrich quickly approached the street-level door. Henrich banged and kicked the door and yelled something to the effect of "Police, police officers, open up." Flamand stood behind Henrich and covered him. A few minutes later, Henrich again banged the door and identified himself as a police officer. The officers then heard fumbling with the lock of the door. The door opened, and John Scott stood in the doorway. According to the officers, Scott held a "long gun" and pointed it at them. Officer Henrich fired a shot that missed Scott. Officer Flamand, apparently believing Scott had fired this shot, fired four shots at Scott, one of which caused the fatal wound.

Discussion

I

Under the Fourth Amendment, police may use only such force as is objectively reasonable under the circumstances. *Graham v. Connor*, 490 U.S. 386, 397 (1989). An officer's use of *deadly* force is reasonable only if "the officer has probable cause to believe

that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985); *see also Graham*, 490 U.S. at 396 (one of factors in determining reasonableness is "whether the suspect poses an immediate threat to the safety of the officers or others"). All determinations of unreasonable force "must embody allowance for the fact that police officers are often forced to make split-second judgment - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97.

The officers here raise the defense of qualified immunity, which shields government officials performing discretionary functions from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "In Fourth Amendment unreasonable force cases, unlike in other cases, the qualified immunity inquiry is the same as the inquiry made on the merits." *Hopkins v. Andaya*, 958 F.2d 881, 885 n.3 (9th Cir. 1992). But, even though reasonableness traditionally is a question of fact for the jury, *see, e.g., White v. Pierce County*, 797 F.2d 812, 816 (9th Cir. 1986); Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1179 (1991), defendants can still win on summary judgment if the district court concludes, after resolving all factual disputes in favor of the plaintiff, that the officer's use of force was objectively reasonable under the circumstances.

Deadly force cases pose a particularly difficult problem under this regime because the officer defendant is often the only surviving eyewitness. Therefore, the judge must ensure that the officer is not taking advantage of the fact that the witness most likely

to contradict his story - the person shot dead - is unable to testify. The judge must carefully examine all the evidence in the record, such as medical reports, contemporaneous statements by the officer and the available physical evidence, as well s any expert testimony proffered by the plaintiff, to determine whether the officer's story is internally consistent and consistent with other known facts. *Hopkins*, 958 F.2d at 885-88; *Ting v. United States*, 927 F.2d 1504, 1510-11 (9th Cir. 1991). In other words, the court may not simply accept what may be a self-serving account by the police officer. It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably.

II

A. Plaintiff argues that the officers should have used alternative measures before approaching and knocking on the door where Scott was located. But, as the text of the Fourth Amendment indicates, the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them. *See, e.g., Illinois v. Lafayette*, 462 U.S. 640 647 (1983); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 n.12 (1976). Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the *least* intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It

would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment.

Officers thus need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable. The officers here clearly did: It's hardly unreasonable for officers to take arms, knock on the door of an apartment and identify themselves as police when an armed man who, they are told, recently fired shots and is acting "crazy"[2] lurks inside.

B. Scott also argues the police officers' conduct violated police department guidelines for dealing with barricaded suspects. Under these guidelines, Scott contends, Henrich and Flamand shouldn't have tried to seize Scott immediately, but should instead have developed a tactical plan to deal with the situation, sealed the possible escape avenues, called for assistance, and tried to get Scott to surrender.

Assuming internal police guidelines are relevant to determining whether use of force is objectively reasonable, *see Tennessee v. Garner*, 471 U.S. 1, 18-19 (1985), they are relevant only when one of their purposes is to protect the individual against whom force is used. Thus, if a police department limits the use of chokeholds to protect suspects from being fatally injured, *see Maddox v. City of Los Angeles*, 792 F.2d 1408, 1414 (9th Cir. 1986), or restricts the use of deadly force to protect suspects from being shot unnecessarily, *see Garner*, 471 U.S. at 18-19, such regulations are germane to the reasonableness inquiry in an excessive force

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claim. But if, for example, the department bans high-speed chases in order to save gas, or to protect bystanders, a suspect arrested after an unauthorized chase can't complain about the violation of a rule not intended for his benefit.[3]

Both the guidelines at issue here and the context in which they appear in the police manual show they were meant to safeguard the police and other innocent parties, not the suspect. They state: "Policy: A barricaded suspect poses an extreme danger to officers who try to arrest him, as well as [ ] other people. . . . It is important to minimize the possibility of injury to the public and officers." ER E at 16. A violation of these guidelines might be deserving of discipline, but it's irrelevant to Scott's case.

III

Scott contends that even if the conduct of the individual officers was objectively reasonable, the municipal defendants may still face liability under *City of Canton v. Harris*, 489 U.S. 378 (1989). While the liability of municipalities doesn't turn on the liability of individual officers, it is contingent on a violation of constitutional rights. Here, the municipal defendants cannot be held liable because no constitutional violation occurred. As noted above, the actions of Officers Flamand and Henrich at all times were

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reasonable and proper: Both their initial decision to enter the building and their subsequent use of force fully complied with the requirements of the Fourth Amendment. Unlike the situation in *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992), there was no violation of the decedent's constitutional rights, and thus no basis for finding the officers inadequately trained. Scott's claims against the municipal defendants must therefore be dismissed. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (per curiam) ("[N]either *Monell*. . . . nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when . . . the officer inflicted no constitutional harm.").

AFFIRMED.

NORRIS, J., dissenting:

John Scott lived in a two-story apartment house in a residential neighborhood in Butte, Montana. On August 4, 1984, Mr. Scott had attempted to evict some troublesome tenants. Twice that day, Mr. Scott called the Butte-Silver Bow Law Enforcement Agency complaining of disturbances caused by these tenants. Among the police officers who responded to the calls and talked to Scott in person was Officer James Henrich. Later the same day, a neighbor called the police and reported hearing gunshots in front of Mr. Scott's building. When Officers Henrich and David Flamand of the Butte-Silver Bow Law Enforcement Agency responded to the call, they were informed that the man who allegedly fired the shots was acting "crazy" and had entered a nearby apartment.

As the District Court described the scene, the officers, with

"weapons drawn . . . immediately approached the door of the apartment where they had been advised the perpetrator had entered." *Scott v. Henrich*, Memorandum and Order (No. CV-87-003-BU) (January 3, 1991), p. 2-3. The officers then "banged and kicked the door and yelled . . . 'Police, police officers, open up.'" Majority Opinion, at 13421. A man, later identified as John Scott, opened the door holding a gun. Believing Scott had raised his weapon, Officer Henrich fired a shot. Officer Flamand then fired four shots into the doorway because he believed the initial shot fired came from Scott's weapon rather than from his partner's. One of his shots killed Mr. Scott. His widow, Doris A. Scott, sued on a theory that her husband's death was caused by an excessive use of force.

On appeal, faced with the harsh reality of her deceased husband's unavailability to testify, Mrs. Scott has abandoned her opposition to summary judgment based on what occurred after the officers assaulted the door. Instead, Mrs. Scott relies solely on her alternative summary judgment theory that focuses on the interval of time *before* the officers assaulted the door. The premise of this theory is that the officers used excessive force by creating an unreasonable risk of armed confrontation with Mr. Scott when they stormed the door without first trying to defuse a potentially deadly situation.

The majority dismisses Mrs. Scott's appellate argument with the simple statement that "the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them." Majority Opinion, at 13423. The majority, however, mischaracterizes Mrs. Scott's argument. She does not argue, as the majority says, that "the officers should have used alternative measures," but rather that the alternative they did choose was objectively unreasonable. The cases the majority cites

are inapposite because they hold only that the availability of less intrusive alternatives does not make otherwise reasonable police conduct unreasonable. *See Illinois v. Lafayette*, 462 U.S. 640, 647 (1983); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 n.12 (1976); *Cady v. Dombrowski*, 443 U.S. 433, 447 (1973) (the availability of less intrusive means does not "by itself, render [the police action] unreasonable"). Mrs. Scott does not argue that the officers' conduct was less reasonable than the alternatives. She argues simply that the decision to rush the door immediately was itself unreasonable because it created an unnecessarily high risk of an armed confrontation. *See, e.g., Alexander v. City and County of San Francisco*, 92-16751, slip. op. at 7494 (9th Cir., July 8, 1991, Kozinski J., concurring) ("I seriously doubt a reasonable judicial officer would have authorized the immediate storming of [plaintiff's] residence by a heavily armed tactical team. Instead, he might have required exhaustion of less intrusive alternatives, like using tear gas or waiting [the plaintiff] out").

In opposition to the summary judgment motion, Mrs. Scott filed a detailed affidavit in which an expert witness expressed the opinion that the officers' conduct created an unreasonable risk of armed confrontation. The expert testified that by rushing the door heavily armed, the officers clearly violated the internal police guidelines of the Butte-Silver Bow Law Enforcement Agency. He cites the following guideline:

> In opposition to the summary judgment motion, Mrs. Scott filed a detailed affidavit in which an expert witness expressed the opinion that the officers' conduct created an unreasonable risk of armed confrontation. The expert testified that by

> rushing the door heavily armed, the officers clearly violated the internal police guidelines of the Butte-Silver Bow Law Enforcement Agency. He cites the following guideline:
>
> A barricaded suspect poses an extreme danger . . . . Officers should not immediately flush a barricaded suspect. Rather they should develop and proceed with a tactical plan. Officers should seal off avenues of escape and call for assistance. When a suspect is isolated, time is normally on the side of the officers. . . . All efforts should be made to persuade the suspect to surrender before force is used.

See Payne Affidavit, CR 122, Exh. E, at 16 (quoting Butte-Silver Bow Law Enforcement Agency Manual). The expert explained that Officers Henrich and Flamand should not have tried to flush Mr. Scott out immediately, but instead should have developed a tactical plan, sealed possible escape paths, called for back up, and tried to coax Scott into surrendering. *See* Payne Affidavit, CR 122, Exh. E, at 14-17.

Internal police regulations and guidelines are relevant to the question of the reasonableness of the force officers use in apprehending suspects. *See Tennessee v. Garner*, 471 U.S. 1, 18-19 (1985) (considering police department policies as relevant in deciding the constitutionality of the use of deadly force); *Maddox v. City of Los Angeles*, 792 F.2d 1408, 1414 (9th Cir. 1986) (considering the rules promulgated by the Los Angeles Police Commission, a local civilian oversight body, in determining whether

a police choke-hold was reasonably applied); *Peraza v. Delameter*, 722 F.2d 1455, 1456 (9th Cir. 1984) (approving use of police department's canine policy as evidence). The majority holds these guidelines to be irrelevant here because the guidelines were intended to protect police officers not suspects such as Mr. Scott, Majority Opinion, at 13424-25. This holding is contradicted by the deposition testimony of Undersheriff Lee that the guidelines are meant, at least in part, to protect the safety of the suspect. *See* Second Petition for Rehearing, at 204. Thus, at the very least, Undersheriff Lee's testimony creates a triable issue of fact as to whether the guidelines are in fact relevant.

Mrs. Scott's expert further opined that not only did the officers' conduct violate Butte-Silver Bow Law Enforcement Agency's guidelines, they also violated contemporary police practices:

> Contemporary accepted police practices recognize that immediate entry into a dwelling or other building for an armed suspect should only be attempted if there are hostages and one has information that a hostage may die or be seriously injured if one does not act immediately.

Id. at 12. The expert emphasized that under contemporary police practices, the officers should have gathered more intelligence about the identity of the person, his intentions, and his mental state. *See id.* at 11-12. If the officers had paused to ask just a few questions, stated the expert, they could have learned that "Mr. Scott was the landlord, that he had been drinking with [the evicted tenants], that he was fearful of them, that he had been threatened by them, and would

have been happy to have the police on hand." *Id.* at 13. Since "[p]assage of time, without immediate resort to an assault tactic, could have diffused [sic] this situation," the expert stated that it was unreasonable for the officers to storm the door without first using a telephone or a bullhorn to try to get Scott to surrender. *Id.*

Viewing the evidence, especially the expert's affidavit, in a light most favorable to Mrs. Scott, *see Ratail Clerks Union Local 648 v. Hub Pharmacy, Inc.*, 707 F.2d 1030, 1033 (9th Cir. 1983), I believe there are triable issues of fact whether it was reasonable to storm the door without first pursuing less confrontational alternatives.

It is true that defendants have offered deposition testimony from law enforcement officers that Officers Henrich and Flamand reacted in accordance with departmental guidelines and conventional police practices. However, Scott's expert specifically controverts such testimony and thereby creates a battle of experts on a material issue of fact, which cannot be decided at summary judgment as a matter of law. *See Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993) ("If a genuine issue of fact exists preventing a determination of qualified immunity at summary judgment, the case must proceed to trial.").

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DORIS A. SCOTT, Individually And As Personal Representative For The Estate Of JOHN WILLIAM SCOTT, Deceased,

Petitioner-Appellant,

-vs-

JAMES L. HENRICH, DAVID J. FLAMAND, BUTTE-SILVER BOW LAW ENFORCEMENT AGENCY, CITY OF BUTTE, and COUNTY OF SILVER BOW,

Defendants-Appellees.

No. 91-35429

ORDER

Filed January 24, 1995

Before: FARRIS, NORRIS and KOZINSKI, Circuit Judges.

1. The petition for rehearing filed by appellant on June 7, 1993 is denied.

2. The panel has voted to deny the petition for rehearing filed by appellant on November 16, 1994; Judge Norris would grant rehearing. The full court has been advised of the

suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed.R.App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Supreme Court, U.S.
FILED
JUN 6 1995
OFFICE OF THE CLERK

No. 94-1738

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

DORIS A. SCOTT, Individually and as Personal Representative of the Estate of JOHN WILLIAM SCOTT, deceased,

Petitioner,

-vs-

JAMES L. HENRICH, DAVID J. FLAMAND, BUTTE-SILVER BOW LAW ENFORCEMENT AGENCY, CITY OF BUTTE, and COUNTY OF SILVER BOW,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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I.

QUESTION PRESENTED FOR REVIEW

The Restated Question For Review Is:

Whether the Circuit Court correctly ruled, after resolving all factual disputes in favor of the Petitioner and considering all evidence in the record, including expert testimony and circumstantial evidence which if believed could convince a rational fact finder that the law enforcement officers acted unreasonably, all of which was proffered by the Petitioner, that the law enforcement officers' use of deadly force was objectively reasonable and constitutionally permissible under the circumstances of this case?

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II.

OPINIONS BELOW

Petitioner (hereafter Scott) failed to identify the original opinion entered by the federal district court out of which Scott's Petition ultimately arises:

1. Scott v. Henrich, et al., 700 F. Supp. 498 (D. Mont. 1988).

III.

STATEMENT OF THE CASE

Respondents provide the following corrections, clarifications, and additions to Scott's STATEMENT OF THE CASE:

The district court initially entered a MEMORANDUM AND ORDER on November 17, 1988, CR 96, concluding that the law enforcement officers had sufficient probable cause to effectuate a seizure of decedent John Scott. 700 F. Supp. at 505. It further ruled that Scott would be granted an additional 60 days to conduct discovery on the "issue of the reasonableness of the Defendant officers' conduct . . . ." Id. at 511. The burden was properly placed upon Scott "to establish the existence of a genuine issue of material fact regarding the reasonableness of the actions taken by [the] officers . . . in effectuating the seizure of John Scott . . . ." Id. Discovery beyond the parameters of the court's Order was stayed pending a determination of the potential liability of the law enforcement officers. Id.

A final MEMORANDUM AND ORDER was filed by the district court on January 3, 1991, which, inter alia, incorporated the reasoning of its November 17, 1988, decision. CR 174 at 11. The court analyzed the conduct of the law enforcement officers utilizing the "objective reasonableness" standard set out by this Court in Graham v. Connor, 490 U.S. 386 (1989). Id. at 3. In spite of the court's grant of additional pre-trial discovery time, Scott was unable to come forward with sufficient evidence "to establish the existence of a genuine issue of material fact . . ." to show that the conduct of the officers, under the circumstances with which they were presented, was unlawful. Id. at 8. On appeal, Scott did not challenge the district court ruling that probable cause existed for the "seizure" of John Scott.

In four separate opinions issued by the Circuit Court, see Pet. App. 11-57, it consistently held that, based on the factual circumstances confronting the law enforcement officers, their conduct was "objectively reasonable" thereby entitling them to judgment in their favor. Scott v. Henrich, et al., 39 F.3d 912, 916 (9th Cir. 1994).

The fatal shooting of John Scott happened at 1 North Clark Street, not 701 West Park as stated in the Petition. Pet. at 8, 11, 12. CR 138 at 62-63, 117. The intersection of Park and Clark Streets is a major thoroughfare in a highly populated residential neighborhood consisting primarily of two and three-story apartment buildings. Clark Street is a main route to the local hospital. Id. at 115. When Sergeant Henrich was first dispatched to a reported disturbance call at 701½ West Park Street on the afternoon of August 4, 1984, he spoke with an unknown individual standing on the sidewalk on

the Park Street side of an apartment building at the intersection of Park and Clark Streets. This unknown individual advised that the disturbance was over. Sergeant Henrich did not learn until the following day, August 5, that the person he spoke with was John Scott. CR 139 at 44-45, 47.

At approximately 8:20 p.m. on the same date, a man and a woman ran into the police station and very excitedly told Sergeant Henrich to "get some officers down to the 600 block of Colorado, there was somebody, some person down there shooting at a kid . . . ." Id. at 58, 62. When the officers arrived at the shooting scene, the victim of the shooting was extremely agitated and stated "that crazy son of a bitch tried to kill me." Id. at 66, 69. A bullet hole was observed and a Winchester .30/.30 caliber rifle cartridge was recovered. Id. at 68, 71. Within minutes of this shooting, the officers received a second report that a man was firing a gun at 701 West Park Street. All officers responded to this location with lights and siren in full operation. Id. at 71, 74.

Upon arrival at the site of the second shooting, the officers were advised that a man acting "strange or crazy" fired a rifle and entered one of two doors located on the east side, the Clark Street side, of a two-story apartment complex at the corner of Park and Clark Streets. CR 138 at 117. The officers were unsure of the location of the armed suspect in the apartment complex or even if he remained in the building. Id. at 62, 67, 91. When officers approached the last known location of the shooting suspect, they were all in full police uniforms, four police vehicles with overhead illuminated revolving warning lights were in operation outside of the apartment building. Id. at 119.

Sergeant Henrich both knocked on and kicked on the door where the armed suspect reportedly entered and shouted out "open up, police" loud enough so that an occupant of another apartment in the complex heard the command. Id. at 119; CR 42, Ex. A. After a short period of time, John Scott, who was extremely intoxicated having a blood alcohol level of .312, opened the door holding a rifle. CR 138 at 135; Scott v. Henrich, et al., 39 F.3d at 915 n.2.

Despite verbal commands to drop his gun, John Scott raised the rifle and pointed it at the officers. Officer Flamand shot at John Scott because, as he explained in his own words:

1. When someone points a gun at you, "more than likely he is going to shoot;"

2. When he first observed Scott in the doorway, he had already leveled his gun at the officers so they were at a disadvantage;

3. He was dealing with an armed man who, as far as he was concerned, had already tried to kill another man at 623 South Colorado Street;

4. He believed the person who fired a rifle at Park and Clark Streets was the same person who had fired a rifle at 623 Colorado Street;

5. He was unsure if anyone had already been shot;

6. He heard a gunshot that he believed was fired by Scott.

CR 138 at 88.

Sergeant Henrich fired his weapon at John Scott because he feared for his own life and thought that he was about to be shot. He intentionally shot after he ordered John Scott to "drop the gun." But, rather than obeying this lawful order, Scott responded by raising the rifle and pointing it directly at Sergeant Henrich. CR 139 at 135.

John Scott was not shot in the back, as alleged by the Petitioner. Physical evidence and expert testimony documented that John Scott was facing the law enforcement officers at the time the shots were first fired. "Stippling" was found on the lower left quadrant of his body which was caused by glass, pieces of the screen from the storm door, and gun powder residue striking his body. CR 66, Ex. 9. "Stippling" only occurs if a person is alive at the time of a shooting. CR 42, Ex. 11. A forensic scientist confirmed that John Scott had to be facing the officers at the time of the shooting in order to cause the "stippling" on the front of Scott's body. Id. at 75-76.

Contrary to Scott's assertions, there was no evidence in the record establishing that either the "barricaded suspect" or "tactical plan" policies of the law enforcement agency applied to the factual circumstances of this case. The "barricaded suspect" policy only applied after a suspect was located and it was confirmed he was refusing to voluntarily surrender. CR 155 at 44, CR 161 at 26, 44, 48, CR 162 at 34-37. The law enforcement of-

ficers testified that their primary objective when they arrived at the scene of the second shooting was to locate the suspect who posed an immediate and imminent danger to innocent persons in a residential neighborhood.

> [A]t that time, we had no idea where the suspect was in relation to the building, if he had stayed in the building or if he was in the upstairs, downstairs. You really couldn't determine from looking at the two doors where they led to.
>
> * * *
>
> We were trying to locate the suspect. He was firing a gun and we felt it was of the utmost importance to locate him as soon as possible to stop him from firing enymore.

CR 138 at 62-63, 132.

By definition a suspect cannot be "barricaded" until he is located.

Similarly, Scott has taken the testimony of Undersheriff Lee out of context in an attempt to imply that some unidentified "tactical plan" policy applied to the situation confronting the law enforcement officers in this case.

> Q. [D]oes the term "tactical response" mean anything to you?
>
> A. (Lee) I don't believe it applied in this particular case. The officers responded to a call. I wouldn't necessarily refer to it

> or describe it as a 'tactical response.'
>
> * * *
>
> Q. So 'tactical response' can be used as just a generic term, can't it?
>
> A. I do have a problem with the term 'tactical' as you are using it.

CR 137 at 12-13.

Undersheriff Lee offered no opinions regarding any specific policy of the law enforcement agency. He was not directing his answers regarding 'formulating [a] plan' at any particular policy of the law enforcement agency.

Following the shooting of John Scott, a comprehensive investigation was undertaken. As part of that investigation, an autopsy was performed by an independent pathologist. CR 172. A coroner's jury was impaneled and an inquest conducted. CR 42, Ex. A. Based on all of the evidence presented during the inquest, the coroner's jury concluded that the officers' use of deadly force was justified. Id. at 172. An Interdepartmental Shooting Review Board also determined, following two days of testimony and presentation of evidence, that the officers' use of deadly force was justified and "in accordance with departmental policy." CR 66; CR 137, Ex. A.

IV.

SUMMARY OF ARGUMENT

Scott's Petition for a Writ of Certiorari is no more than her final attempt to convince this Court of last resort that every other court that has reviewed the circumstances of this case is wrong. She is asking this Court to be the ultimate "fact finder," a role this Court has consistently rejected. Scott's Petition does not raise any special or important reasons which would justify this Court in exercising its discretion to accept the Writ of Certiorari. Her condemnation of the Circuit Court opinion is unjustified both factually and legally. The procedural record in this case speaks for itself regarding the close scrutiny and attention afforded to Scott throughout the proceedings below. No issue of national significance is implicated by Scott's Petition.

The Circuit Court correctly followed the mandates of this Court in reaching its decision. The conduct of the law enforcement officers was measured against the constitutionally mandated standard of "objective reasonableness." When all factual disputes were resolved in favor of Scott, taking into consideration all circumstantial evidence and expert testimony, the conduct of the law enforcement officers comported with all constitutional mandates. Although other alternatives may have been available to the law enforcement officers to deal with the life-threatening situation presented by John Scott's indiscriminate firing of a high-powered rifle in residential neighborhoods, the officers were not constitutionally bound to choose the alternative which Scott's expert believed was best or least

intrusive. Rather, the law enforcement officers were duty-bound to act within the parameters of constitutionally acceptable conduct, i.e., objective reasonableness. Having met this constitutional standard, the Circuit Court properly affirmed judgment in their favor.

V.

ARGUMENT

A. THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING SCOTT'S PETITION FOR A WRIT OF CERTIORARI.

1. The Ninth Circuit Court Of Appeals Followed The Accepted And Usual Course Of Judicial Proceedings In Rendering Its Decision In This Case.

Scott has not presented any legitimate basis for the granting of the Petition. Scott's unsubstantiated and groundless accusations that the Circuit Court "decision has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision," Pet. at 27, should be summarily rejected. Scott's own rendition of the procedural history of this proceeding belies this charge. The record on appeal clearly documents that this case was the subject of intense scrutiny. Otherwise, it would not have required four separate decisions over a 2½ year period to reach the ultimate disposition of this case. It is disingenuous for Scott to attempt to justify this Court's acceptance of the Petition by ridiculing the Circuit Court, particularly in light of the procedural appellate history of this case.

The true basis of Scott's Petition is not, as she alleges, that the Circuit Court has departed from the accepted and usual course of judicial proceedings. Rather, what she truly seeks is review in this Court because she is dissatisfied with the outcomes below. Every entity that has been called upon to review the circumstances of this case, beginning with the law enforcement investigative team and proceeding through the coroner's inquest, the Shooting Review Board, the federal district court, and finally the Ninth Circuit Court of Appeals on four separate occasions, has reached the same conclusion. The conduct of the law enforcement officers in responding to the grave threat posed by John Scott was justified, i.e., "objectively reasonable." The Circuit Court comported with the acceptable and usual course of judicial proceedings in reaching its final decision.

2. The Circuit Court's Opinion Followed The Mandates Of This Court's Applicable Decisions.

The decision in this case was based on the established precedent of this Court. The Circuit Court citing Graham v. Connor, 490 U.S. 386 (1989), recognized that law enforcement officers were held to a standard of "objective reasonableness." Scott v. Henrich, et al., 39 F.3d at 914. The court refused to apply the standard of care proposed by Scott, i.e., that of unlimited liability regardless of the factual circumstances confronting law enforcement officers. What Scott is requesting this Court to do is grant certiorari to analyze every "fact" found in the record and determine if it too would have reached the same conclusion as every other court that has been called upon to do so. This procedure has long been

proscribed by this Court. "We do not grant certiorari to review evidence and discuss specific facts." United States v. Johnson, 268 U.S. 220, 227 (1925). See also, Texas v. Mead, 465 U.S. 1041 (1984) (Stevens, J.).

It is not the function of this Court to second-guess the courts below. It properly should determine whether there was some identifiable conflict between the opinion of the Circuit Court in this case and the decisions issued by this Court. Because no such conflict exists, regardless of how many times and how many ways Scott characterizes her displeasure with the ultimate ruling of the Circuit Court, the Petition should be denied. Scott's condemnation of the Circuit Court's ruling is unjustified and unsupported by either the facts or the applicable law.

B. CONSIDERING THE IMMINENT, LETHAL THREAT POSED BY JOHN SCOTT TO INNOCENT PERSONS, INCLUDING THE LAW ENFORCEMENT OFFICERS, THEIR USE OF DEADLY FORCE WAS JUSTIFIED AND OBJECTIVELY REASONABLE.

When John Scott chose to point a rifle at the law enforcement officers, ignoring warnings to "drop the gun," they acted in an objectively reasonable manner by discharging their firearms in defense of themselves and in defense of innocent bystanders. "Objective reasonableness" is the measure of constitutionally permissible conduct under the circumstances of this case. Graham v. Connor, 490 U.S. at 397. The Circuit Court decision followed the dictates of this Court promulgated in Graham.

The Circuit Court did not, as argued by Scott, give "remarkably short shrift" to her arguments that the alleged "tactical response" of the officers violated Fourth Amendment standards. Pet. at 17. Rather, the court recognized its obligation to "carefully examine" all evidence in the record, including expert testimony, to ensure that the officers have "not tak[en] advantage of the fact that the witness most likely to contradict [their] story, the person shot dead, is unable to testify." Scott, 39 F.3d at 915. The court noted that it could not accept "self-serving accounts by the police officer[s]." Id. It applied the stringent standard of whether all of the evidence proffered by Scott, considered in the light most favorable to the Petitioner, "could convince a rational fact finder that the officer[s] acted unreasonably." Id. Because Scott could not meet this burden of proof, presenting adequate evidence which could convince a rational fact finder that the officers acted unreasonably, summary judgment was mandated. "[D]efendants can still win on summary judgment if the district court concludes, after resolving all factual disputes in favor of the plaintiff, that the officers' use of force was objectively reasonable under the circumstances." Id.

1. The Circuit Court Properly Resolved The Issue Of Qualified Immunity By Summary Ruling.

Simply because Scott presented evidence from her retained expert that, in his opinion, other alternatives could have been utilized to effect the seizure of John Scott does not mandate a jury trial. If so, the defense of qualified immunity would never be susceptible to summary ruling. Scott's argument thereby conflicts with the pronounce-

ments of this Court regarding a government official's right to resolve qualified immunity questions at the earliest appropriate opportunity.

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims . . . that are adequately based in fact to have those claims tried to a jury, but also for the rights of persons opposing such claims . . . to determine in the manner provided by the rule, prior to trial, that the claims . . . have no factual basis.

Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (emphasis added).

The Circuit Court was keenly aware that when qualified immunity is raised as a defense by law enforcement officers to a claim of unconstitutional conduct, as it was in this case, the qualified immunity question should be resolved at the earliest possible stage of litigation. Mitchell v. Forsyth, 473 U.S. 511, 526 (1985). This Court has established that summary judgment is appropriate when discovery does not produce evidence sufficient to create a genuine issue of material fact. Id. Because qualified immunity is "immunity from suit rather than a mere defense to liability . . . [it] is effectively lost if a case is erroneously permitted to go to trial." Id.

This Court described the importance of qualified immunity questions being resolved at the earliest possible opportunity in Anderson v. Creighton, 483 U.S. 635 (1987):

> One of the purposes of the Harlow qualified immunity standard is to protect public officials from the internal broad ranging discovery that can be 'particularly disruptive of effective government.' (Citations omitted). For this reason, we have emphasized qualified immunity questions should be resolved at the earliest possible stage of a litigation. (Citations omitted).

Id. at 646 n.6.

2. The Law Enforcement Officers Were Not Constitutionally Mandated To Choose The Least Intrusive Alternative To Effect The Seizure Of John Scott.

The Circuit Court followed the mandates of this Court in upholding summary judgment in favor of the law enforcement officers. Scott contends that because the retained expert presented alternative courses of action which the law enforcement officers may have followed, a jury question was presented. Scott misses the point of the Circuit Court's constitutional analysis. "[A]s the text of the Fourth Amendment indicates, the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them." Scott, 39 F.3d at 915.

The Circuit Court pointed out why "endless second-guessing of police decisions made under stress and subject to the exigencies of the moment" cannot be a basis for liability.

> Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the least intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves.

Id.

The opinions of Scott's retained expert graphically demonstrate the "endless second-guessing of police decisions" which the Circuit Court warned against. What Scott continues to argue is for the adoption of "the 20/20 vision of hindsight" rejected by this Court in Graham v. Connor, 490 U.S. at 396. Therefore, although the opinions of Scott's experts may raise an issue of whether a less intrusive alternative was available to the officers, it does not conflict with the Circuit Court's ruling that the alternative chosen by the officers was "objectively reasonable" and thereby constitutionally acceptable.

3. No Interdepartmental Policies Of The Law Enforcement Agency Were Intended To Protect An Unidentified, Violent Suspect Who Was Indiscriminately Firing A High-Powered Rifle In Residential Neighborhoods.

The Circuit Court correctly ruled that no interdepartmental policy of the law enforcement agency was relevant to the question of the objective reasonableness of the conduct of the law enforcement officers. It properly placed the testimony of Undersheriff Lee in the context in which his answers to Scott's questions were posed. Undersheriff Lee did not, as represented by Scott, testify that the barricaded suspect and tactical plan policies of the law enforcement agencies were intended to protect suspects like John Scott. His testimony was actually that the policies referenced by Scott were not even implicated at the time of the shooting.

The policies of the law enforcement agency could only reach constitutional significance if they were relevant to the actual factual circumstances presented to the officers. The Circuit Court examined the policies and concluded "[b]oth the guidelines at issue here and the context in which they appear in the police manual show they were meant to safeguard the police and other innocent parties, not the suspect." Scott, 39 F.3d at 915-16.

The court did not simply disregard the policies, as argued by Scott. It fairly analyzed the content and context of the policies to determine their relevance to the objective reasonableness

inquiry. Having done so, it concluded that, even giving the benefit of the doubt to Scott, the policies could not form the basis of a constitutional claim against the law enforcement officers. Therefore, there was no triable issue of fact raised by the law enforcement agency's guidelines, rules, and policies.

4. The Municipal Defendants Cannot Be Held Liable Absent A Constitutional Violation.

The potential liability of the Butte Law Enforcement Agency and Butte-Silver Bow County were derivative from Scott successfully establishing a constitutional claim against the law enforcement officers. Because summary judgment was properly granted in favor of the law enforcement officers, no individual liability can now arise against the Law Enforcement Agency and Butte-Silver Bow County. "[N]either Monell . . . nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when . . . the officer inflicted no constitutional harm." City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) (per curiam). The Circuit Court properly applied this rule to the municipal Defendants.

VI.

CONCLUSION

Scott's Petition for a Writ of Certiorari should be denied. There is no factual or legal basis which would justify this Court in exercising its discretion to grant the Petition. The conduct of the law enforcement officers was "objectively

reasonable," no more is expected nor demanded by the United States Constitution.

Respectfully submitted this 6th day of June, 1995.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

DORIS A. SCOTT, individually and as Personal Representative of the Estate of JOHN WILLIAM SCOTT, deceased,

Plaintiff,

vs.

JAMES L. HENRICH, DAVID J. FLAMAND, BUTTE-SILVER BOW LAW ENFORCEMENT AGENCY, CITY OF BUTTE, and COUNTY OF SILVER BOW,

Defendants.

NO. CV-87-003-BU-PGH

MEMORANDUM AND ORDER

The plaintiff brings this civil rights action pursuant to 42 U.S.C. § 1983. The plaintiff also advances numerous pendent claims for relief predicated upon the law of the State of Montana. The matter is presently before the court on motion of all named defendants requesting the court to enter summary judgment in their respective favors upon those claims for relief prosecuted under 42 U.S.C. § 1983. The defendants further request the court to refrain from exercising its pendent jurisdiction over those claims advanced by the plaintiff which are predicated upon Montana law.

Filed contemporaneously with, and in obvious response to, the defendants' motions for summary judgment was a motion by the plaintiff seeking leave of court to amend the complaint. Because disposition of the defendants' motion for summary judgment would be directly affected by disposition of the plaintiff's motion to amend, the court appropriately addresses the motions simultaneously.

I.

This action has its genesis in the shooting death of John Scott by a law enforcement officer in the employ of Butte-Silver Bow County, Montana (hereinafter the "County").[1] According to the allegations advanced in the complaint by Doris A. Scott, the widow of John Scott, police officers James L. Henrich and David J. Flamand responded to a call on August 4, 1984, regarding the discharge of a firearm in the location of the intersection of Park and Clark Streets in Butte,

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[1]The complaint names as defendants the "City of Butte" and "County of Silver Bow". The court notes these two former governmental entities were consolidated in 1977 to form a single governmental entity denominated Butte-Silver Bow County, Montana.

The complaint also names both the Butte-Silver Bow law enforcement agency and Butte-Silver Bow as defendants. The latter entity is the local governmental entity. The former agency is the law enforcement department of Butte-Silver Bow, created pursuant to local ordinance promulgated under authority of state law. Mont. Code Ann. § 7-3-1104. For purposes of determining liability under 42 U.S.C. §§ 1983 and 1988, both of the defendant entities are properly considered as the local governmental entity.

Montana. Upon their arrival at the location, the officers were advised, by a local resident, that an individual had fired a rifle in the area and had entered a nearby apartment. While the precise events which transpired immediately following the officers' arrival may prove to be the subject of a factual dispute, for purposes of providing background, it suffices to summarize that officers Henrich and Flamand, with weapons drawn, went to the door of the apartment which they were apprised the perpetrator had entered, and that John Scott responded to the officers' announcement by opening the door of the apartment. As events transpired, shots were fired by Officer Flamand which resulted in the death of John Scott. The officers have stated John Scott was in possession of a shotgun at the time he opened the door, and the officers fired their weapons when Scott pointed the shotgun at Sergeant Henrich.

Doris Scott, individually and as personal representative of the estate of her deceased husband, instituted the present action under 42 U.S.C. § 1983 against officers Henrich and Flamand, the Butte-Silver Bow law enforcement agency and Butte-Silver Bow County, Montana, claiming that the defendants' conduct violated the rights secured John Scott by the fourth and fourteenth amendments to the United States Constitution.[2] Scott also advances a myriad of

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[2]Scott also alleges a violation of the due process clause of the fifth amendment. The fifth amendment, however, constrains the conduct of the federal government and its actors, and will not serve as the basis of a section 1983 claim. See, Brower v. Inyo County, 812 F.2d 540, 545 (9th Cir. 1987). Scott's fifth amendment claim is simply duplicative of her fourteenth amendment claim.

claims predicated upon the law of the State of Montana.

II.

In her original complaint Scott alleges that the conduct of officers Henrich and Flamand negligently caused the suffering and ultimate death of John Scott. With respect to the County, Scott alleges those entitles were negligent in their selection, training and supervision of Henrich and Flamand, as well as in the formulation and enforcement of policies and procedures governing the conduct of the officers within their employ, and that such negligence was the cause of the constitutional deprivations suffered by John Scott. Scott seeks to amend her complaint, as originally filed, to allege the conduct of the defendants which led to the purported deprivation of John Scott's constitutional rights was grossly negligent in nature, amounting to a deliberate indifference by the defendants. Furthermore, Scott seeks to further allege that the defendant entities actually endorsed the alleged grossly negligent conduct of officers Henrich and Flamand.

Characterizing Scott's proposed amendment to the original complaint as an attempt to artfully plead around the defendants' motions for summary judgment, the defendants object to Scott's request for leave as untimely, and imply that amendment to the pleadings should not be allowed during the pendency of a motion for summary judgment. The defendants submit the original complaint fails to state a civil rights claim cognizable under 42 U.S.C. § 1983, since the complaint only sets forth

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See, Smith v. City of Fontana, 818 F.2d 1411, 1424 (9th Cir. 1987).

allegations of simple negligence.

While some courts have refused leave to amend the pleadings sought after the opposing party has moved for summary judgment, see, e.g., Freeman v. Continental Gin Company, 381 F.2d 459 (5th Cir. 1967), rehearing denied, 384 F.2d 365, the fact that a party seeks to amend his pleading after a motion for summary judgment has been filed by the opposition is an insufficient basis, in and of itself, to deny leave to amend. See, United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981); Sherman v. Hallbauer, 455 F.2d 1236 (5th Cir. 1972). As a general rule, where the amendment sought alleges a different or more refined theory of liability or defense, a court should hold a motion for summary judgment in abeyance pending submission of the opposing party's proposed amended pleading. See, Adzaidi v. Ehrlich, 732 F.2d 1218 (5th Cir. 1984). Cognizant of the nature of the amendment to the complaint which Scott seeks, the court is convinced the interests of justice dictate that Scott be afforded the opportunity to amend her complaint. The allegations of the complaint, as amended, are sufficient to state a claim under 42 U.S.C. § 1983.

In Daniels v. Williams, 474 U.S. 327, 330-32 (1986), the Supreme Court held that "the Due Process Clause is simply not implicated by a negligent act of an official causing an unintended loss of or injury to life, liberty or property." (emphasis in original.) The Court reiterated in Davidson v. Cannon, 474 U.S. 344, 347 (1986), that the due process restrictions "are just not triggered by lack of due care" by state officials, and therefore allegations of negligence do not state a claim cognizable under 42 U.S.C. § 1983. The Court in Daniels expressly reserved the question "whether something less than intentional conduct,

such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause." Daniels, 474 U.S. at 334 n.3.

Since Daniels this circuit has followed earlier case law holding that the Due Process Clause can be implicated by conduct of state officials amounting to "recklessness," or "gross negligence" or "deliberate indifference". See, Wood v. Ostrander, 851 F.2d 1212, 1214-15 (9th Cir. 1988) (recognizing that the intentional assertion of government power which tends to show a disregard for a claimant's safety was sufficient to state a claim under section 1983); Estate of Conners v. O'Connor, 846 F.2d 1205, 1208 (9th Cir. 1988) (conscious indifference amounting to gross negligence is sufficient to state a claim under section 1983); Ketchum v. County of Alameda, 811 F.2d 1243, 1246 and n.3 (9th Cir. 1987) (gross negligence is sufficient to state a claim under section 1983); Bergquist v. County of Cochise, 806 F.2d 1364, 1370 (9th Cir. 1986); (recognizing that conduct constituting gross negligence may create a section 1983 liability).

The allegations of simple negligence upon which Scott's original complaint was predicated would be insufficient to state a claim cognizable under 42 U.S.C. § 1983. The allegations of Scott's complaint as amended, however, allege that the defendants acted with gross negligence amounting to deliberate indifference to the victim's well-being. Accordingly, the allegations are sufficient to defeat the defendants' motion for summary judgment.

III.

Scott seeks relief on behalf of the decedent's estate, pursuant to 28 U.S.C. § 1983, upon the ground the conduct of officers Henrich and Flamand, and the policies and customs of Butte-

Silver Bow, violated the rights secured John Scott by the fourth amendment, as applicable to the states through the fourteenth amendment, Wolf v. Colorado, 338 U.S. 25 (1949), and the substantive due process rights granted by the fourteenth amendment. The allegations of Scott in that regard are two-pronged. First, she alleges officers Henrich and Flamand lacked probable cause justifying the seizure of John Scott. Secondly, she asserts the officers utilized excessive force in effectuating the "seizure" of John Scott. Scott further alleges that the County by "policy or custom endorsed unreasonable seizure and the application of excessive force by [its] law enforcement officers."

PROBABLE CAUSE

While probable cause is ordinarily a question for the jury, summary judgment upon the issue is appropriate if the evidence of record is such that no reasonable jury could find that the officers lacked probable cause. McKenzie v. Lamb, 738 F.2d 1005, 1008 (9th Cir. 1984). In determining whether there exists a genuine issue of material fact which would preclude the entry of summary judgment pursuant to Fed.R.Civ.P. 56, all facts in the record and inferences drawn from them must be viewed in the light most favorable to the non-moving party. See, Water West, Inc. v. Entek Corporation, 788 F.2d 627, 628-29 (9th Cir. 1986); Clipper Exspress v. Rocky Mountain Motor Tariff, 690 F.2d 1240, 1250 (9th Cir. 1982). In accordance with the prescriptions of Fed.R.Civ.P. 56(c), the moving party bears the burden of establishing that there are no genuine issues of material fact which preclude the entry of summary judgment. See, Aydin Corporation v. Loral Corporation, 718 F.2d 897 (9th Cir. 1983). However, when a motion for summary judgment is made and supported by

appropriate affidavits, the non-moving party is required to produce evidence demonstrating the existence of a genuine issue of material fact. See, Celotex Corporation v. Catrett, 477 U.S. 217 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Even in the absence of opposing affidavits, however, summary judgment is inappropriate where the moving parties' papers are insufficient on their face to establish that the movant is entitled to summary judgment as a matter of law. See, Hamilton v. Keystone Corporation, 539 F.2d 684, 686 (9th Cir. 1976).

In support of their motion for summary judgment upon the issue of probable cause, the defendants rely primarily upon the sworn testimony of officers Henrich and Flamand, together with the sworn testimony of one officer Maylevac, who also responded to the disturbance call preceding the fatal shooting. Scott has filed no affidavits or other evidence in opposition to the defendants' motion for summary judgment upon the issue of probable cause. Accordingly, the court must accept the facts stated in the testimony of the officers as true, and determine whether those facts are sufficient to warrant the entry of summary judgment in the officers' favor as a matter of law. See, White by White v. Pierce County, 797 F.2d 812, 815 (9th Cir. 1986).

While Scott is not precise in the presentation of her position with respect to the issue of probable cause, the court perceives her claim to be three-fold in nature. First, Scott implies that upon arrival at the scene, the officers lacked probable cause to believe that an offense had been committed. Second, Scott implicitly asserts that assuming the officers had probable cause to believe an offense had been committed, they nonetheless lacked probable cause to believe that the person to

be arrested would be found within either the apartment complex, or the specific apartment where John Scott had retreated. Thirdly, Scott asserts that the officers lacked probable cause to effectuate the "seizure" of John Scott at the precise time the fatal shooting occurred.

It is obviously quite true that if a law enforcement officer enters a private premises for the purpose of making a warrantless arrest, there must exist probable cause to believe that the person being sought has committed an offense. See, Draper v. United States, 358 U.S. 307 (1959). Likewise, the court recognizes that before entry of a private premises to arrest is permissible, the arresting officer must have probable cause to believe that the person to be arrested is within the particular premises to be entered. See, Payton v. New York, 445 U.S. 573 (1980). See also, United States v. Phillips, 497 F.2d 1131 (9th Cir. 1974). Such inquiries into the existence of probable cause, however, are necessitated only if the law enforcement officers enter a private premises to effectuate an arrest. See, United States v. Santana, 427 U.S. 38 (1976).

It is undisputed in the record that the "seizure" of John Scott occurred when John Scott opened the door of the apartment in response to Sergeant Henrich's knock and announcement. Consequently, the "seizure" of John Scott occurred in the open doorway of the apartment. In United States v. Santana, supra, the Supreme Court upheld the warrantless arrest of defendant who was standing within the frame of her doorway as the arresting officers approached, but who then retreated into the vestibule of her home where the officers followed and effected the arrest. The Ninth Circuit Court of Appeals has applied the holding of Santana to uphold the legality of a

warrantless arrest of a defendant as he stood in the doorway of his home. United States v. Botero, 589 F.2d 430 (9th Cir. 1978), cert. denied, 441 U.S. 944 (1979). The present situation, however, differs from that presented in Santana and Botero since the situation is one where the suspect was "seized" as he stood inside his home and the officers stood outside with drawn weapons. Under such circumstances, it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home. United States v. Johnson, 626 F.2d 753, 757 (9th Cir. 1980). Consequently, absent probable cause, the officers were not free to enter the home of Scott to effectuate the arrest of the believed perpetrator.

"Probable cause is a fluid concept--turning on the assessment of probabilities in particular factual context--not readily, or even usefully, reduced to a neat set of legal rules." Illinois v. Gates, 462 U.S. 213, 232 (1983), reh. denied, 463 U.S. 1237. Probable cause is determined by applying a "totality of the circumstances" analysis, Id. at 238, and requires a "probability or substantial chance of criminal activity." Id. at 243 n.13; see also, Merriman v. Walton, 856 F.2d 1333 (9th Cir. 1988). The probable cause test is an objective one which requires the existence of facts which would warrant a belief by "a prudent man," Henry v. United States, 361 U.S. 98, 102 (1959), "a man of reasonable caution," Draper v. United States, 358 U.S. 307, 313 (1959), or "a reasonably discreet and prudent man." Dumbra v. United States, 268 U.S. 435, 441 (1925). Based upon the uncontroverted facts of record, the court is compelled to conclude that officers Henrich and Flamand did, in fact, have probable cause to believe that an offense had been committed in the

area of the Scott apartment, and that the perpetrator of that offense was, at the pertinent time, located within the apartment occupied by John Scott.

The situation presented to officers Henrich and Flamand is similar to that which the Supreme Court commented upon in Warden v. Hayden, 387 U.S. 294 (1967):

> The police were informed that an armed robbery had taken place, and that the suspect had entered [a certain house] less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for person and weapons could have insured that [the perpetrator] was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.

387 U.S. at 298-299.

Based upon the information conveyed to officers Henrich and Flamand, a reasonable man would have engaged in the course of action taken by those officers. The officers had reasonable cause to believe there existed a present danger which warranted an immediate intrusion into the apartment occupied by John Scott. The test

employed is one of objective reasonableness under the circumstances as they existed at the time the challenged conduct occurred, measured by the information possessed by the officers at that time. Information gained after the fact cannot be relied upon in analyzing the propriety of the officers' conduct. See, Sherrod v. Berry, 856 F.2d 802, 804-805 (7th Cir. 1988).

Consequently, we come to the issue of whether officers Henrich and Flamand possessed sufficient probable cause to effectuate a seizure of John Scott at the precise time the fatal shooting occurred. "Probable cause exists where the facts and circumstances within the officers' knowledge and of which they had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested." Dunaway v. New York, 442 U.S. 200, 208 n.9 (1979). Applying the law to the facts as established in the record, the court is constrained to conclude officers Henrich and Flamand had probable cause to believe that John Scott was the individual whom the officers were seeking in connection with the reported incident to which they had responded. The officers' reliance upon the statements of an average citizen were reasonable since such statements carry a sufficient indicia of reliability to warrant the officers' reliance upon them to enter the premises of the designated apartment. See, Chambers v. Moroney, 399 U.S. 42 (1970); United States v. Easter, 552 F.2d 230 (8th Cir. 1977); United States v. Wilson, 479 F.2d 236. This information coupled with Sergeant Henrich's observation that the individual who opened the door of the apartment was in the possession of a firearm would have provided the officers with sufficient probable cause to effectuate

a seizure of that individual. Whether Sergeant Henrich actually observed a gun, however, is a point contested by Scott, and which precludes summary judgment at this juncture.

A) EXCESSIVE FORCE

Apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the fourth amendment. Tennessee v. Garner, 471 U.S. 1, 7 (1985). The reasonableness of force is analyzed in light of such factors as a requirement for the officer's safety, the motivation for the arrest and the extent of the injury inflicted. McKenzie v. Lamb, 738 F.2d 1005, 1011 (9th Cir. 1984). Accordingly, an allegation that the force utilized in effectuating a personal seizure was excessive, as measured by the foregoing factors, states a claim for relief under 42 U.S.C. 1983 predicated upon the fourth amendment. Smith v. City of Fontana, 818 F.2d 1411, 1416 (9th Cir. 1987). The question of the reasonableness of the force used in a particular arrest is a question of fact properly determined by the trier of fact, unless qualified immunity is at issue, thereby mandating the trial court to decide the issue on summary judgment. White by White v. Pierce County, 797 F.2d 812, 816 (9th Cir. 1986) (citations omitted).

The issue presented for determination with regard to Scott's claim of excessive use of force by the officers is whether the defendant officers have demonstrated, as a matter of law, that they are immune from suit. Mitchell v. Forsyth, 472 U.S. 511 (1985). In determining whether the defendants have sustained their burden under Fed.R.Civ.P. 56, the record must be viewed in the light most favorable to the non-moving party. Kraus v. County of Pierce, 793 F.2d 1105, 1110 (9th Cir. 1986); Water West, Inc. v. Entek Corporation, 788

F.2d 627, 628-29 (9th Cir. 1986).

Officers Henrich and Flamand submit there exists no genuine issue of material fact precluding summary judgment in their favor with respect to their claim of qualified immunity. In support of their motion, the officers rely upon the sworn testimony they gave at the Coroner's inquest into the death of John Scott, impressing upon the court that it remains uncontroverted that they resorted to the use of deadly force in response to John Scott pointing a shotgun at them. Consequently, the officers submit their use of deadly force was constitutionally permissible under the circumstances.

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Supreme Court held that public officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. "Whether an official may prevail in his qualified immunity defense depends upon the 'objective reasonableness of [his] conduct as measured by reference to clearly established law.' No other 'circumstances' are relevant to the issue of qualified immunity." Davis v. Scherer, 468 U.S. 183, 191 (1984) (citations omitted). Accordingly, the issue to be addressed in resolving the defendants' claim of qualified immunity in the case at bar is whether a reasonable police officer could have believed, in light of clearly established law, that the use of deadly force was lawful under the circumstances. See, Anderson v. Creighton, ___ U.S. ___, slip op. pp.3-6 (June 25, 1987); Mitchell v. Forsyth, 472 U.S. 511 (1985).

Analysis must begin with a review of the state of the law at the time of the shooting at issue. In Tennessee v. Garner, 471 U.S. 1 (1985), the

Court, in addressing the constitutionality of a fleeing felon statute, which authorized the use of deadly force to prevent the escape of all felony suspects, stated:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

471 U.S. at 11-12. Because a claim of qualified immunity must be assessed in light of clearly established law at the time of the incident in question, it is necessary to determine exactly when any change in law which affects the validity of the claim occurred. See, Procunier v. Navarette, 434 U.S. 555 (1978). In that regard, the court recognizes that the March 27, 1985, ruling in Garner post-dated the incident at issue in the case at bar. However, it is undisputed that Garner did not alter the state of the law with respect to the use of deadly force in self-defense or to prevent serious physical harm to another.[3]

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[3]The court notes that at the time of the fatal shooting of John Scott, Montana statutory law provided at Mont.Code Ann. § 45-3-102 (1984):

Likewise, there exists no dispute in the case at bar that at the time of the fatal shooting of John Scott, it was clearly established in the law that the use of excessive force by police officers in an arrest violates the arrestee's fourth amendment right to be free from an unreasonable seizure and substantive due process of law.[4]

Scott asserts two arguments in opposition to the officers' motion for summary judgment upon the basis of qualified immunity. First, Scott contends qualified immunity is unavailable to the officers because the law at the time of the shooting clearly established the fourth amendment's proscription against the use of excessive force to effectuate an arrest, and the fourteenth amendment's grant of

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> A person is justified in the use of force or threat to use force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force likely to cause death or serious bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or serious bodily harm to himself or another or to prevent the commission of a forcible felony.

[4]Egregious government conduct in the form of excessive and brutal use of physical force constitutes a violation of substantive due process of law as guaranteed by the fourteenth amendment. See, Smith v. City of Fontana, 818 F.2d at 1417; Rutherford v. City of Berkley, 780 F.2d 1444, 1447 (9th Cir. 1986).

substantive due process right to be free from egregious government conduct. Second, Scott contends that even if the officers are entitled to rely upon the defense or qualified immunity, there exist genuine issues of material fact precluding the entry of summary judgment. Scott's argument is predicated upon her conclusion that the presence of established law regarding broad constitutional rights, by itself, precludes an official from claiming qualified immunity. The rationale expressed by the Supreme Court in Anderson v. Creighton, supra, however, establishes that Scott's view is erroneous. This precise conclusion has recently been emphasized by the court of appeals for this circuit in Thorsted v. Kelly, No. 87-6297 (9th Cir. Oct. 3, 1988).

The court in Thorsted rejected a claimant's argument that the defense of qualified immunity is unavailable when the right which is alleged to have been violated is clearly established in the law. Id., slip op. p.12409. The court in Thorsted reiterated the following conclusion reached by Justice Scalia in Anderson v. Creighton, supra, slip op. p. 5:

> It simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the fourth amendment then Anderson's search was objectively legally unreasonable. We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials--like other officials who act in

> ways they reasonably believe to be lawful--should not be held personally liable. The same is true of their conclusion regarding exigent circumstances.

The court in Thorsted correctly understood Anderson to warrant an expanded inquiry into the objective legal reasonableness of a government official's conduct thereby entitling an official to claim qualified immunity on the ground that "he could reasonably have believed his conduct was lawful in light of the clearly established principles" at issue. Id. at 12410. In accordance with the rationale espoused by the Court in Anderson, officers Henrich and Flamand are clearly entitled to assert the defense of qualified immunity on the ground that they could reasonably have believed their conduct was lawful in light of the clearly established principles relating to the use of deadly force to effectuate an arrest.

Officers Henrich and Flamand seek to establish their entitlement to qualified immunity by way of a motion for summary judgment pursuant to Fed.R.Civ.P. 56. The officers submit there exists no genuine material issues of fact regarding the objective reasonableness of their use of deadly force to effectuate the seizure of John Scott. In response to the officers' motion, Scott submits that there exist factual issues regarding: (1) whether the officers knew or should have known that their actions were violative of constitutional rights, and (2) whether the officers' actions were objectively reasonable. With respect to the former contention, it is well established that the subjective element of the good faith immunity doctrine has been eliminated. See, Harlow v. Fitzgerald; see also, Bilbrey v. Brown, 738 F.2d 1462, 1465, n.5 (9th

Cir. 1984). With respect to the latter contention, the court is cognizant of the fact that the question of whether a reasonable officer placed in a particular set of circumstances could reasonably believe that his conduct was legal is a fact-specific one. See, Thorsted v. Kelly, supra, slip. op. at 12413.

Officers Henrich and Flamand have supported their motion by admissible evidence, i.e., sworn statements made by competent witnesses on personal knowledge, which, standing alone, would entitle them to judgment as a matter of law. In accordance with Fed.R.Civ.P. 56(e), it is incumbent upon Scott to rebut the officers' showing with evidence which would preclude a directed verdict for the officers. See, See v. Durang, 711 F.2d 141 (9th Cir. 1983); Jason v. Fonda, 698 F.2d 966 (9th Cir. 1982). Scott has the burden to come forward with specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e). See, Anderson v. Liberty Lobby, Inc., 477 U.S. 242.

Review of the papers submitted by Scott in opposition to the officers' motion reveals that Scott relies primarily upon an attack to the credibility of the moving parties' sworn statements. However, opposition raising merely a credibility issue is insufficient to preclude summary judgment. See, National Union Fire Insurance Company v. Argonaut Insurance Company, 701 F.2d 95 (9th Cir. 1983); Matter of Citizens Loan and Savings Company, 621 F.2d 911, 913 (8th Cir. 1980). Additionally, Scott suggests the existence of two facts which, in her opinion, preclude the entry of summary judgment: (1) subsequent testing of the gun purportedly held by John Scott at the time of the shooting failed to reveal the weapon bore traces of Scott's fingerprints and (2) John Scott was shot in the back. Scott implicitly suggests these facts

support the inference that the officers' sworn statements are not credible thereby creating a genuine issue of material fact to be resolved by the jury. With respect to the latter fact, Scott ignores the expert testimony presented at the Coroner's inquest held in connection with the death of John Scott and offered by officers Henrich and Flamand in support of their motion for summary judgment. The testimony of two expert witnesses, i.e., a pathologist and forensic scientist, who testified at the Coroner's inquest indicate that at the time of the shooting John Scott was facing, or standing somewhere between sideways and ten degrees forward, to the shotgun fired by Officer Flamand. With respect to the lack of discernible fingerprints upon the weapon purportedly held by John Scott, Scott offers no additional evidence which establishes a reasonable basis for drawing an inference adverse to the evidence presented by officers Henrich and Flamand.

Based upon the circumstances surrounding the transaction in which this litigation has its genesis, it appears to the court that expert testimony would be essential to rebut the evidence presented by officers Henrich and Flamand in support of their motion for summary judgment. Scott has not offered the affidavits of any experts in opposition to the movant's evidence.[5] In the

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[5]The court notes that where the affidavits of experts are offered in opposition to a motion for summary judgment, such affidavits may be sufficient to defeat the motion where they put forward facts for a reasonable basis for drawing adverse inferences from the movant's evidence. See, National Union Fire Insurance Company v. Argonaut Insurance Company, 701 F.2d 95, 97 (9th Cir. 1983); Bieghler v. Kleppe, 633 F.2d 531, 533-

opinion of the court, such expert testimony would be necessary for the trier or fact to legitimately draw the inference that a reasonable officer placed in the position of Henrich and Flamand would not have experienced such apprehension as to warrant the use of the deadly force to which officers Henrich and Flamand resorted. See, Neely v. St. Paul Fire and Marine Insurance Company, 584 F.2d 341, 345 (9th Cir. 1978). The court's conclusion in this regard is based upon recognition of the fact there is no indication in the record any other eyewitnesses to the incident exist, who could provide evidence probative of the circumstances surrounding the shooting.

Mindful that care must be taken to insure the opponent or a motion for summary judgment adequate opportunity to conduct the discovery necessary to garner facts essential to rebut the movant's evidence, the court deems it advisable to continue the motion for summary judgment sub judice, as it pertains to officers Henrich and Flamand, to allow Scott to pursue discovery in an effort to obtain evidence sufficient to rebut the movants' evidence of record. See, Fed.R.Civ.P. 56(f); First National Bank v. Cities Service, 391 U.S. 253, 294-98 (1968). Such discovery, however, shall be limited to that discovery which bears upon the factual issue of whether the conduct of John Scott, at the time of the shooting, placed officers Henrich and Flamand in apprehension of their own safety.[6]

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34 (9th Cir. 1980).

[6]The court is compelled to note that while discovery in this matter is presently stayed, review of the record reveals that Scott had in

LIABILITY OF COUNTY

Scott also contends the County should be held liable independent of the individual officer defendants because the officers, in effectuating the seizure of John Scott, acted pursuant to the policies, practices and procedures of the County. The County submits, however, Scott has failed to establish the existence of a genuine issue of material fact regarding the adequacy of the County's hiring and training procedures sufficient to defeat a motion for summary judgment. More importantly, the County asserts that because it remains uncontroverted in the record that officers Henrich and Flamand acted properly and reasonably under the circumstances, the claims advanced by Scott against the County must necessarily fail.

Local governmental entities may be held liable for a constitutional violation "when execution of a government's policy or custom, whether made by its law makers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." Monell v. New York City Department of Social Services, 436 U.S. 658, 694 (1978). Consequently, in order to hold a local governmental entity liable for an unconstitutional

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excess of ten months from the date this action was instituted, to conduct discovery necessary to rebut the sworn testimony presented at the Coroner's inquest, and upon which officers Henrich and Flamand rely. Nonetheless, the court finds it appropriate to provide Scott the additional opportunity to conduct discovery necessary to address the specific issue upon which the motion for summary judgment with respect to the claims of excessive force turns and lack of probable cause turns.

act committed by an employee, a claimant must first establish the existence of a municipal policy, and second, that the policy caused the constitutional violation of which the claimant complains. 436 U.S. at 692. The local governmental entity cannot be subjected to vicarious liability under section 1983 for an unconstitutional act committed by an employee. 436 U.S. at 691. Rather, the governmental entity may be held liable only when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U.S. at 690. "It is when execution of a government's policy or custom, whether by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under section 1983." 436 U.S. at 694.

Recognizing that execution of the "policy" challenged in Monell would necessarily violate the constitutional rights of the affected individual, the Court expressly disclaimed any intent to "address . . . what the full contours of municipal liability may be." 436 U.S. at 694-95. The Court did recognize, however, that the municipal policy must be the "moving force" of the constitutional violation. 436 U.S. at 694-95. The "moving force" requirement is satisfied where a governmental entity's deliberate policy or act directly violates a person's constitutional rights. See, Owen v. City of Independence, 445 U.S. 622 (1980); City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). At the same time, the Court, cognizant of maintaining the distinction between direct and vicarious liability under section 1983, has studiously cautioned that in those situations where the "policy" at issue is not itself unconstitutional

and therefore, execution of the policy does not compel a constitutional violation, careful analysis is required to determine the requisite causal connection between the policy and the constitutional deprivation. See, Oklahoma City v. Tuttle, 471 U.S. 808, 824-825 (1985); City of Springfield, Massachusetts v. Kibbe, ___ U.S. ___, slip op. p.8 (1987) (O'Connor, J., dissenting).

In the years since Monell was decided, the Court, in attempting to delineate the precise contours of municipal liability under section 1983, has considered several cases presenting the issue of whether an isolated act by a government official or employee represented official policy sufficient to impose liability upon the governmental entity under section 1983. The Court's decisions have resulted in the establishment of a continuum within which the municipal policy alleged in a particular case must be placed, with the ultimate determination to be made being whether a jury reasonably could conclude that the governmental entity's conduct was the moving force in bringing about the alleged constitutional violation. See, Springfield v. Kibbe, supra, slip-op. at pp.8-9; St. Louis v. Praprotnik, ___ U.S. ___, slip op. at pp.9-10 (1988). This precise point is echoed in the statement offered by Justice O'Connor in Praprotnik:

> We have assumed than an unconstitutional government policy could be inferred from a single decision taken by the highest officials responsible for setting policy in that area of the government's business. (citations omitted) At the other end of the spectrum we have held that an unjustified shooting by a police officer cannot, without more, be thought to

> result from official policy. (citations omitted)

City of St. Louis v. Praprotnik, supra, slip op. p.10.

In the case at bar, municipal liability is urged upon the basis the County was grossly negligent in the hiring and training of its law enforcement officers. The Supreme Court has not, to this point in time, recognized that a policy which itself is not unconstitutional can ever meet the "policy" requirement of Monell. See, Oklahoma City v. Tuttle, 471 U.S. at 824, n.7. Nor, has the Supreme Court yet resolved the standard of proof required for claims based on a city's failure to act or inadequate acts as "policy" within the meaning of Monell. Id.; see also, City of Springfield, Massachusetts v. Kibbe, supra, slip op. at p.10. The court of appeals for this circuit, however, has recognized that a policy of "inadequate training" constitutes an actionable policy or custom within the meaning of Monell. See, Bergquist v. County of Cochise, 806 F.2d 1364, 1369. The court in Bergquist further held that a policy of "gross negligence" in training or supervision gives rise to municipal liability under section 1983. 806 F.2d at 1370.[7]

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[7]Other lower federal courts have characterized the requisite degree of fault essential to impose municipal liability under section 1983 for a deficient training policy as "deliberate indifference", see, e.g., Fiacco v. City of Rensselaer, 783 F.2d 319, 326 (2nd Cir. 1986), gross negligence amounting to "conscious indifference", see, e.g., Languirand v. Hayden, 717 F.2d 220, 227 (5th Cir. 1983), cert. denied, 467 U.S. 1215 (1983), or gross negligence "amounting to deliberate indifference", see,

The County does not, in essence, quarrel with the general proposition advanced by Scott to the effect, that if the conduct of officers Henrich and Flamand was sufficiently unreasonable to violate constitutional standards, liability may be visited upon the County under section 1983 if an "affirmative link" existed between the alleged deprivation of John Scott's constitutional rights and the County's purported "policy" of grossly inadequate hiring and training of its law enforcement officers. See, Oklahoma City v. Tuttle, 471 U.S. at 824-825, n.8; Rizzo v. Goode, 423 U.S. 362, 370-71 (1976). Rather, the County submits Scott has failed to present sufficient evidence to rebut the County's showing that its policies of hiring and training are both adequate, and in conformance with the law of the State of Montana. In addition, the County submits that because the conduct of officers Henrich and Flamand was entirely reasonable under the circumstances, and therefore did not cause a constitutional deprivation of John Scott's rights, it necessarily follows, as a matter of law, that the County cannot be held liable to Scott as its liability was dependent upon the unreasonableness of the officers' actions.

Whether a local governmental entity has a "policy" of inadequate hiring and training presents a question of fact, as does the related question whether that "policy" is the moving force behind a constitutional violation. Both issues may be

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Voutour v. Vitale, 761 F.2d 812, 820 (1985), or gross negligence which insures "that police misconduct is almost inevitable", see, Hayes v. Jefferson County, 668 F.2d 869, 874 (6th Cir. 1982), cert. denied, 459 U.S. 833 (1982). See also, Patzner v. Berquet, 779 F.2d 1363 (8th Cir. 1985).

susceptible to disposition via summary judgment, if a claimant is unable to meet his burden under Fed.R.Civ.P. 56 of rebutting a showing by the local governmental entity that the challenged hiring and training procedures are adequate to warrant the entry of judgment in that entity's favor. The court recognizes, however, that in the present case Scott may not have been afforded sufficient time to conduct that discovery necessary to rebut the County's position. At the same time, the court finds it prudent to require Scott to establish the existence of a genuine issue of material fact regarding the reasonableness of the actions taken by officers Henrich and Flamand prior to allowing Scott to engage in extensive discovery regarding the adequacy of the County's hiring and training procedures. Consistent with the court's prior determination that the burden presently rests upon Scott to establish the existence of a genuine issue of material fact regarding the reasonableness of the actions taken by officers Henrich and Flamand in effectuating the seizure of John Scott, the court deems it advisable to stay discovery with respect to the issue of the County's liability under section 1983 until such time as the court resolves the motion for summary judgment of officers Henrich and Flamand.

Therefore, for the reasons set forth herein,

IT IS HEREBY ORDERED that the defendants' motions for summary judgment shall be taken under advisement for a period of sixty (60) days. The plaintiff may engage in further discovery during the sixty-day period, with discovery limited to elucidating evidence bearing upon the issue of the reasonableness of the defendant officers' conduct as delineated herein.

DATED this 17th day of November, 1988.

/s/ Paul G. Hatfield
PAUL G. HATFIELD
UNITED STATES DISTRICT JUDGE